Petition

81-622

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

v.

COMMERCIAL METALS CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a carrier's violation of credit regulations issued under the Interstate Commerce Act should estop it from collecting the lawful tariff charge from the consignor of an interstate freight shipment, where the consignor is primarily liable under the terms of the bill of lading.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

Petitioner's parent company is Southern Pacific Company. The partially owned subsidiaries and affiliates of the petitioner are:

St. Louis Southwestern Railway Co.
The Ogden Union Railway & Depot Co.
Portland Traction Company
Portland Terminal Railroad Co.
Sunset Railway Company
Central California Traction Company
Trailer Train Company

The wholly and partially-owned subsidiaries and affiliates of St. Louis Southwestern Railway Co. are:

Alton & Southern Ry. Co.
Arkansas & Memphis Ry. Bridge & Terminal Co.
Dallas Terminal Ry. & Union Depot Co.
St. Louis Southwestern Ry. Co. of Texas
Southern Illinois & Missouri Bridge Co.
Southwestern Transportation Co.
Terminal R.R. Association of St. Louis
Glascar Inc.
Main Street Warehouse Company
The Southwestern Town Lot Corp.
Kansas City Terminal Railway Co.
Trailer Train Company

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COMMERCIAL METALS CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Southern Pacific Transportation Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 30, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 641 F.2d 235 (5th Cir. 1981), and appears in the Appendix at 1a to 8a. The opinion of the District Court for the Northern District of Texas, which has not been reported, appears in the Appendix at 12a to 16a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 30, 1981. A timely petition for rehearing *en banc* was denied on June 29,

1981. Subsequently, the Court of Appeals granted petitioner leave to file out of time a petition for rehearing by the panel, which petition was denied on July 21, 1981. Out of an abundance of caution, this petition for certiorari is being filed within 90 days of the date of denial of the original petition for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 3(2) of the Interstate Commerce Act, 49 U.S.C. § 3(2) (1976), subsequently recodified at 49 U.S.C. § 10743 (Supp. III 1979), is set forth in the Appendix at 25a to 27a. Section 1320.1 of the regulations promulgated under this provision, 49 C.F.R. § 1320.1 (1980), is set forth in the Appendix at 27a.[1]

STATEMENT OF THE CASE

Petitioner Southern Pacific Transportation Company ("Southern Pacific") brought suit in the District Court for the Northern District of Texas against respondent Commercial Metals Company ("Commercial Metals") to recover the freight charges on three shipments of steel cobble shipped by rail from Detroit, Michigan, to Alhambra, California, in April and May of 1974. As the case was tried on a stipulated record, the facts are not in dispute.[2]

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[1] Section 3(2) pertains to rail carriers. Similiar sections relating to motor carriers and water carriers, which have also been recodified into 49 U.S.C. § 10743 (Supp. III 1979), and the comparable regulations issued under them, are set forth in the Appendix at 28a to 32a.

[2] A copy of the Stipulation of Facts appears in the Appendix at 18a to 24a. References to the Stipulation will be in the form "Stip. No. ——, App. at —."

Each of the three shipments was consigned by Commercial Metals to the initial carrier, Penn Central Transportation Company ("Penn Central"),[3] under a uniform straight bill of lading as prescribed by the Interstate Commerce Commission ("ICC"). Under section 7 of the bill of lading, Commercial Metals, as consignor of the goods, could have limited its liability for the freight charges by executing the non-recourse clause on the face of the bill of lading.[4] It did not. Stip. No. 7, App. at 19a. As a result, Commercial Metals was primarily liable for any freight charges not paid by the consignee.

The first of the three shipments, consisting of a railcar of steel cobble, was tendered to the Penn Central on April 11, 1974 for shipment to the designated consignee, Carco Steel Corporation ("Carco") in Alhambra, California. Stip. No. 14, App. at 20a. On April 25, 1974, Southern Pacific delivered this railcar to Carco without collecting the freight charge in advance. Instead, a freight bill for the correct amount—$4,634.11—was

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[3] Each of the three shipments moved over the lines of the Penn Central, the St. Louis Southwestern Railway Company, and the Southern Pacific. Southern Pacific has already paid the other two carriers their proportionate share of the freight charges earned on these shipments. Stip. No. 9, App. at 19a.

[4] Section 7 of the Uniform Straight Bill of Lading, prescribed by the Interstate Commerce Commission, provides in relevant part:

> The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges.

In re Bills of Lading, 64 I.C.C. 357, 364A (Appendix D) (1921). This provision appeared on each of the three bills of lading involved in this case. Stip. Nos. 6-7, App. at 19a.

mailed to Carco. Stip. Nos. 16-18, App. at 20a. Carco's creditworthiness had not been investigated by Southern Pacific, Stip. No. 11, App. at 20a, and Carco did not pay the freight bill.

On May 2, 1974, Commercial Metals consigned two more railcars of steel cobble to Penn Central for shipment to Carco. These cars were delivered by Southern Pacific to Carco on May 16, 1974, but only after Southern Pacific had received from Carco two checks in the amount of $5,761.79 and $2,383.67 in payment of the freight charges. The correct freight charges due for the two shipments were $5,761.79 and $3,283.66. Carco's bank subsequently dishonored the two checks. Stip. Nos. 19-23, App. at 20a to 21a.

On May 20, 1974, Southern Pacific issued freight bills for the correct amounts to Carco. Stip. No. 24, App. at 21a. On August 23, 1974, after further efforts to collect the unpaid freight charges from Carco had proved fruitless, Southern Pacific brought suit against Carco in the Superior Court of California, Los Angeles County. Stip. No. 29, App. at 22a. Repeated attempts to serve the summons and complaint on Carco were unsuccessful. Stip. Nos. 36-40, 43, 45, App. at 23a to 24a. On December 17, 1976, Southern Pacific notified Commercial Metals of Carco's failure to pay the freight charges and requested that Commercial Metals, as a consignor which did not execute the non-recourse provision in the bill of lading, pay the $13,679.56. Stip. No. 41, App. at 23a to 24a. When payment was not forthcoming, Southern Pacific instituted the present action in the District Court on April 8, 1977, invoking the court's jurisdiction under 28 U.S.C. § 1337. Stip. Nos. 4, 44, App. at 19a, 24a.

The District Court concluded that Southern Pacific had "established a prima facie case for the recovery of the freight charges" from Commercial Metals, so that Commercial Metals was liable "[a]bsent a showing of valid

and affirmative defenses." App. at 13a to 14a. The court then held, however, that Commercial Metals had established a valid, equitable defense by virtue of Southern Pacific's failure to comply with the credit regulations promulgated by the ICC under section 3(2) of the Interstate Commerce Act, 49 U.S.C. § 3(2). App. at 13a to 14a.

The Court of Appeals affirmed the judgment of the District Court, recognizing that the

> sole question presented by this appeal is whether the failure of a carrier to comply with credit regulations promulgated under the Interstate Commerce Act is a defense available to a consignor . . . who failed to execute a nonrecourse provision in the relevant bill of lading.

641 F.2d at 235-236, App. at 1a. "[W]e are compelled to hold," the Court of Appeals concluded, "that the carrier's failure to comply with the applicable ICC regulations is a defense, available to Commercial, in an action by the carrier for unpaid freight charges." *Id.* at 239, App. at 8a. On petition for rehearing *en banc*, a judge in active service requested a poll of the members of the full court, but a majority of the judges did not vote in favor of *en banc* reconsideration. App. at 10a. A petition for rehearing by the panel was also denied. App. at 11a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE HIGHEST COURTS OF SEVERAL JURISDICTIONS WHICH HAVE REJECTED THE "CREDIT VIOLATION" DEFENSE ADOPTED BY THE FIFTH CIRCUIT

Under the traditional practice, both the consignor and the consignee are primarily liable for the freight charge when the consignor fails to execute the non-recourse clause in the bill of lading. *See Illinois Steel Co. v. Balti-*

more & Ohio Railroad, 320 U.S. 508, 513 (1944).[5] It is also well-established that equitable defenses, such as estoppel, ordinarily are not available to shippers in suits brought by carriers to recover freight charges under lawful published tariffs. As Mr. Justice Brandeis wrote for the Court in *Louisville & Nashville Railroad v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924), the amount of a freight charge under a tariff rate is "fixed by law."

> No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. *Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor.*

Id. (emphasis added). Similarly, in *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 485 (1939), the Court stated that "equitable considerations may not serve to justify failure of [the] carrier to collect, or retention by [the] shipper of, any part of lawful tariff charges." *See also New York Central & Hudson River Railroad v. York & Whitney Co.*, 256 U.S. 406, 408 (1921); *Pittsburgh*,

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[5] Indeed, the rule that the consignor is liable unless it executes the non-recourse clause of the bill of lading has been followed even where the consignor and the carrier have agreed that the freight charge will be collected only from the consignee. *See, e.g.*, Consolidated Freightways Corp. of Del. v. Pacheco Int'l Corp., 488 F. Supp. 68 (C.D. Cal. 1979); New York, N. H. & H. R.R. v. California Fruit Growers Exch., 125 Conn. 241, 5 A.2d 353, *cert. denied*, 308 U.S. 567 (1939); Pennsylvania R.R. v. Marcelletti, 256 Mich. 411, 240 N.W. 4 (1932); Moss Lumber Co. v. Michigan Cent. R.R., 219 Ala. 593, 123 So. 90 (1929); New York Cent. R.R. v. Federal Sugar Ref. Co., 235 N.Y. 182, 139 N.E. 234 (C.A.N.Y. 1923); New York Cent. R.R. v. Warren Ross Lumber Co., 234 N.Y. 261, 137 N.E. 324 (C.A.N.Y. 1922); *cf.* Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co., 130 F. 860 (9th Cir.), *cert. denied*, 195 U.S. 629 (1904) (parol evidence inadmissible to vary terms of bill of lading).

Cincinnati, Chicago & St. Louis Railway v. Fink, 250 U.S. 577, 582-83 (1919).

Despite this Court's clear statements that equitable defenses should not be recognized, a sharp division has developed in the lower courts on the question whether equitable defenses such as estoppel are available to a shipper in an action by a regulated carrier to recover freight charges.[6] *Compare, e.g., Atlantic Coast Line Railroad v. Wannamaker Chemical Co.*, 216 S.C. 226, 57 S.E. 2d 311 (1950) (estoppel defense rejected), *with Missouri Pacific Railroad v. Dermott Grocery & Commission Co.*, 246 Ark. 1286, 441 S.W.2d 798 (1969) (estoppel defense recognized where carrier represented to consignee that freight charges were "prepaid").[7]

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[6] The term "regulated carrier" refers to a rail carrier, motor carrier, or water carrier regulated under the Interstate Commerce Act. The Act, as it existed at the time this case arose, contained provisions requiring each type of carrier to collect freight charges prior to delivery except as permitted under credit regulations promulgated by the Interstate Commerce Commission. These statutory provisions were virtually identically worded, *compare* 49 U.S.C. § 3(2) (1976) (rail carrier) *with* 49 U.S.C. § 323 (1976) (motor carrier) *and* 49 U.S.C. § 918 (1976) (water carrier), App. at 25a to 32a, and in fact have since been recodified in one provision, 49 U.S.C. § 10743 (Supp. III 1979). Similarly, the regulations under these provisions, while they differ in certain particulars such as the number of days permitted for collection of credit accounts, follow essentially the same pattern. *Compare* 49 C.F.R. § 1320.1 (1980) (rail carrier) *with* 49 C.F.R. § 1322.1(a) (1980) (motor carrier) *and* 49 C.F.R. § 1323.1 (1980) (water carrier), App. at 27a to 32a. Because of this similarity, courts have generally treated cases construing these provisions interchangeably. *See, e.g.*, Consolidated Freightways Corp. of Del. v. Eddy, 266 Ore. 385, 513 P.2d 1161, 1163 (1973) (rail carrier cases "apposite" to case involving "nearly identical" motor carrier statute and regulations).

[7] This sharp division over the question whether equitable defenses are available in an action by a carrier to recover lawful tariff charges has caused great confusion and uncertainty, prompting one commentator to decry the "striking lack of uniformity

In particular, the federal courts of appeals, and the highest courts of at least four states, are in direct conflict over the precise issue posed in this case. In the decision below, the Court of Appeals for the Fifth Circuit concluded that an extension of credit in violation of the credit regulations constitutes a valid defense in a suit to collect the freight charges. The Court of Appeals thus joined appellate courts in Arkansas and Georgia, which have reached the same conclusion. *See Aero Mayflower Transit Co. v. Hofberger*, 259 Ark. 322, 532 S.W.2d 759 (1976); *Westover v. United Van Lines, Inc.*, 154 Ga. App. 865, 270 S.E.2d 74 (1980).

The rule adopted by these courts, however, is directly contrary to the result reached by the highest courts of three other states and by the Court of Appeals for the Tenth Circuit. *See Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546 (10th Cir. 1967) (violation of 49 U.S.C. § 918, governing credit arrangements of water carriers, does not estop carrier to collect from consignee); *American Red Ball Transit Co. v. McCarthy*, 114 N.H. 514, 323 A.2d 897 (1974), *cert. denied*, 420 U.S. 930 (1975) (motor carrier's violation of ICC credit regulations does not estop it from recovering from consignee); *Consolidated Freightways Corp. of Delaware v. Eddy*, 266 Ore. 385, 513 P.2d 1161 (1973) (en banc) (motor carrier's violation of ICC credit regulations does not estop it from recovering from consignor which failed to execute non-recourse provision of bill of lading); *AAA Trucking Corp. v. Spherex, Inc.*, 110 N.H. 472, 272 A.2d 594 (1970) (per curiam) (motor carrier's violation of ICC credit regulations does not estop it from recovering from consignor); *Western Maryland Railway v. Cross*,

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in decisions concerning the liability of consignors and consignees despite the obvious need for uniformity in interstate commercial transactions." Note, *Carriers: Federal Bills of Lading: Liability of Parties to a Prepaid Shipment*, 38 Cornell L. Q. 596, 603 (1953).

96 W. Va. 666, 123 S.E. 572 (1924) (rail carrier's violation of ICC credit regulations under 49 U.S.C. § 3(2) does not estop it from recovering from consignor, even where shipment was sent "freight collect").[8] Indeed, even after the decision of the Fifth Circuit in this case, the District Court for the Southern District of New York reached an opposite conclusion, stating in *Consolidated Rail Corp. v. Containair Systems Corp.*, No. 80 Civ. 6814 (S.D.N.Y. August 31, 1981) [reprinted in Appendix at pages 33a to 39a], "[N]othing in the [ICC rail carrier credit] regulation permits the cancellation of charges payable in accordance with legal tariffs as a sanction for untimely billing." Slip op. at 7, App. at 39a (footnote omitted). These courts properly recognized, as the Supreme Court of New Hampshire put it, that "the mere fact that the plaintiff extended credit to the consignee for more than seven days is no bar to its action. The purpose of this clause is . . . not to enable the consignor to avoid payment, but to prevent discrimination." *AAA Trucking Corp. v. Spherex, Inc.*, 110 N.H. 472, 272 A.2d 594, 595 (1970).

In deciding in the present case that an equitable defense based on a credit violation is permissible, the court below relied heavily on the decision of a divided panel of the Seventh Circuit in *Consolidated Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971). In *Admiral* the carrier had marked the bill of

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[8] The Fifth Circuit's decision in this case is also in direct conflict with the decisions of a number of lower state courts. *E.g.*, Arizona Feeds v. Southern Pac. Transp. Co., 21 Ariz. App. 346, 519 P.2d 199 (1974) (rail carrier's violation of ICC credit regulations does not bar recovery from consignee); East Texas Motor Freight Lines v. Franklin County Distilling Co., 184 S.W.2d 505 (Tex. Civ. App.—El Paso 1944, no writ) (motor carrier's violation of ICC credit regulations does not bar recovery from consignor). *See also* New York Cent. R.R. v. James B. Berry Sons, 12 A.2d 588 (Pa.), *cert. denied*, 311 U.S. 671 (1940).

lading "prepaid" even though payment had not been received from the consignor. Thus, the primary issue was whether estoppel could be premised on such a false representation to the consignee. The Seventh Circuit held that the carrier was estopped from recovering from the consignee because the carrier's own actions had induced detrimental reliance on the part of the consignee. *Id.* at 59.[9] By way of dictum, however, the court went on to say that the carrier's extension of credit to the consignor beyond the period permitted by the ICC's credit regulations, 49 C.F.R. § 1322.1, constituted "additional grounds for intervention of the principles of equity" because the credit extension "created the risk of loss" and "contributed to the gravity of the loss." 442 F.2d at 60.

Admiral is plainly distinguishable from the present case in view of the carrier's false representation in *Admiral* that the freight bill had been "prepaid" and the prospect of double payment by the consignee. Moreover, the *Admiral* decision, from a divided panel of the Seventh Circuit, was itself in conflict with the decisions of a substantial number of state courts which have declined

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[9] In so holding, the Seventh Circuit joined a number of other courts which have recognized an equitable defense limited to the situation where the carrier's false representation of prepayment has induced detrimental reliance on the part of the consignee. *See, e.g.*, Southern Pac. Transp. Co. v. Campbell Soup Co., 455 F.2d 1219 (8th Cir. 1972) (rail carrier); Farrell Lines, Inc. v. Titan Indus. Corp., 419 F.2d 835 (2d Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970) (water carrier); Missouri Pac. R.R. v. National Milling Co., 409 F.2d 882 (3d Cir. 1969) (rail carrier); Davis v. Akron Feed & Milling Co., 296 F. 675 (6th Cir. 1924) (rail carrier), *reaffirmed in* United States v. Mason & Dixon Lines, Inc., 222 F.2d 646 (6th Cir. 1955) (motor carrier); Hilt Truck Lines, Inc. v. House of Wines, Inc., 207 Neb. 568, 299 N.W.2d 767 (1980) (dictum) (motor carrier); E. L. Murphy Trucking Co. v. Climate Control, Inc., 523 P.2d 1224 (Utah 1974) (motor carrier); Missouri Pac. R.R. v. Dermott Grocery & Comm'n Co., 246 Ark. 1286, 441 S.W.2d 798 (1969) (rail carrier).

to recognize *any* equitable defenses, even in cases where the carrier's representation that the shipment has been "prepaid" has induced detrimental reliance on the part of a consignee. *E.g., Southern Pacific Co. v. Wheaton Brass Works*, 5 N.J. 594, 76 A.2d 890 (1950), *cert. denied*, 341 U.S. 904 (1951) (rail carrier); *Atlantic Coast Line Railroad v. Wannamaker Chemical Co.*, 216 S.C. 226, 57 S.E.2d 311 (1950) (rail carrier); *Atlantic Coast Line Railroad v. West Paving Co.*, 228 N.C. 94, 44 S.E.2d 523 (1947) (rail carrier); *Union Pacific Railroad v. Eyres Transfer & Warehouse Co.*, 12 Wash.2d 282, 121 P.2d 340 (1942); *Norfolk & Western Railway v. Williamson Grocery Co.*, 103 W. Va. 532, 138 S.E. 102 (1927) (rail carrier); *Chicago & North Western Railway v. J.I. Case Plow Works*, 173 Wis. 237, 180 N.W. 846 (1921) (rail carrier). This same broad rule has been followed in a number of federal courts, including the Court of Appeals for the Tenth Circuit. *E.g., Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546 (10th Cir. 1967) (water carrier); *Western & Atlantic Railroad v. Underwood*, 281 F. 891 (N.D. Ga. 1922) (rail carrier); *Great Northern Railway v. Hyder*, 279 F. 783 (W.D. Wash. 1922) (rail carrier).

Although the District Court below forthrightly acknowledged the conflict between its decision and those of other courts, App. at 15a, the Fifth Circuit failed to distinguish—or even to cite—any of the cases which had rejected the "credit violation" defense. Instead it referred only to the *Admiral* decision and a line of lower state court cases construing *Admiral* as establishing that a violation of the credit regulations automatically estops the carrier from recovering the freight charge.[10] The

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[10] *See* Checker Van Lines v. Siltek Int'l Ltd., 169 N.J. Super. 102, 404 A.2d 333 (App. Div. 1979) (dictum); Brown Transp. Corp. v. Atcon, Inc., 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014 (1978); Allied Van Lines, Inc. v. Hanson, 131 Ga. App. 506, 206 S.E.2d 108 (1974); Aero May-

court below thus compounded a conflict which had already attracted this Court's notice. In *Brown Transportation Corp. v. Atcon, Inc.*, 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014 (1978), cited by the Fifth Circuit in support of its holding, Mr. Justice White and Mr. Justice Blackmun dissented from the denial of the writ of certiorari on the ground that the "conflict among jurisdictions over an issue which 'imperatively demand[s] a single uniform rule' . . . commands the Court's immediate attention." 439 U.S. at 1015 (citation omitted).[11]

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flower Transit Co. v. Harbin, 126 Ga. App. 72, 190 S.E.2d 91 (1972). *See also* Aero Mayflower Transit Co. v. Hofberger, 259 Ark. 322, 532 S.W.2d 759 (1976) (motor carrier estopped by credit violation; not cited below); Westover v. United Van Lines, Inc., 154 Ga. App. 865, 270 S.E.2d 74 (1980) (same); *cf.* Centre Carriers, Inc. v. Barker, 44 App. Div. 2d 312, 354 N.Y.S.2d 215 (1974) (dictum: "credit violation" defense available upon proper showing by shipper).

[11] The petition for certiorari in that case, however, did not draw to the Court's attention the full extent of the conflict, since the decisions of the Court of Appeals for the Tenth Circuit, Bartlett-Collins Co. v. Surinam Navigation Co., 381 F.2d 546 (10th Cir. 1967), the Supreme Court of Oregon, Consolidated Freightways Corp. of Del. v. Eddy, 266 Ore. 385, 513 P.2d 1161 (1973), and the Supreme Court of Appeals of West Virginia, Western Maryland Railway v. Cross, 96 W. Va. 666, 123 S.E. 572 (1924)—all directly contrary to the result reached in the present case and in *Brown*—were not cited. *See* Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia, Brown Transportation Corp. v. Atcon, Inc., No. 77-1581 (October Term, 1977). Also overlooked was the decision of the Supreme Court of Arkansas in Aero Mayflower Transit Co. v. Hofberger, 259 Ark. 322, 532 S.W.2d 759 (1976), which arguably supports the result reached by the court below. Moreover, the petition failed to point out, as is argued herein, that the "credit violation" defense is inconsistent with the intent behind the credit regulations, since these regulations were instituted, in part, to protect the carriers against economic pressure from shippers. *See* discussion *infra* at pp. 17-21.

The conflict which existed when the *Brown* case was before the Court has only grown worse in the intervening years. A decision by the Court clarifying this troubled area of the law would undoubtedly be welcomed by the lower courts, *see, e.g., Metro Shippers, Inc. v. Life Savers, Inc.*, 509 F. Supp. 606, 613 (D.N.J. 1980),[12] and would go far towards dispelling the current confusion and uncertainty.

II. THE ISSUES RAISED BY THIS PETITION ARE RECURRING AND IMPORTANT FOR THE NATION'S RAILROADS

The conflict among appellate courts with respect to the availability of the "credit violation" defense is of great practical importance to the nation's railroads. As the Interstate Commerce Commission has found, violations of its credit regulations are common, and in many instances unavoidable. *See Regulations for Payment of Rates and Charges, Ex Parte No. 73*, 326 I.C.C. 483, 485-87, 489-90 (1966).[13] Thus, it is not surprising that, since

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[12] The district court in *Metro Shippers* deliberately sidestepped the issue whether an estoppel defense is available to a shipper, observing that:

> There is . . . a division on this point among federal and state jurisdictions, and the conflict has not been resolved by the Supreme Court. An opportunity to resolve the conflict was presented by the petition for certiorari in *Brown Transportation Corp. v. Atcon, Inc.*, 439 U.S. 1014 . . . (1978), a case from the Georgia courts, but certiorari was denied.

509 F. Supp. at 613.

[13] Indeed, a 1966 study by the ICC's Bureau of Enforcement found that almost a third of 15,751 freight bills examined were overdue, and nearly half of those were more than 10 days overdue. Regulations for Payment of Rates and Charges, Ex Parte No. 73, 326 I.C.C. 483, 485 (1966). Although the methodology of this study was questioned by the railroads, the railroads' own figures showed that of 445,984 collectible items accrued during the period of the investigation, 10,202 (or about 2.24 per cent) resulted in credit violations. *Id.* at 486.

1970, the "credit violation" defense adopted by the court below has been raised at the appellate level in at least 13 cases, with markedly different results in the various jurisdictions. *See* cases cited at pp. 8-12 *supra*.

The confusion and conflict among the courts with respect to the availability of equitable defenses places regulated carriers in an untenable position. If a carrier inadvertently violates the applicable credit regulations in attempting to collect from a consignee, it cannot know whether it should seek recovery from the consignor or not. If it fails to bring suit on the theory that recovery is precluded by an equitable defense, it may be subject to civil and criminal penalties under the Elkins Act, 49 U.S.C. §§ 11901(d), 11903, 11904 (Supp. III 1979), which forbids carriers to grant preferences or otherwise to discriminate. It is even questionable whether a carrier can settle a suit seeking full payment of a tariff without granting a preference. *See Chicago, Burlington & Quincy Railroad v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1267-68 (8th Cir. 1973); *In re Penn Central Transportation Co.*, 477 F.2d 841, 844 (3d Cir.), *aff'd sub nom. United States Steel Corp. v. Trustees of Penn Central Transportation Co.*, 414 U.S. 885 (1973). *See also Akers Motor Lines, Inc. v. Lady Cornell Comb Co.*, 203 F. Supp. 156, 157 (D. Mass. 1962) ("carrier has not only the right but the duty to recover its proper charges for the services performed"). Yet, if the carrier brings suit against the consignor and pursues its appeal to the court of last resort for the jurisdiction, the carrier may find itself—as Southern Pacific has here—with no recovery to justify the expense of the litigation.

The decision of the court below exacerbates the already confused situation because the estoppel permitted here goes well beyond the factual circumstances which have heretofore been held to support an equitable defense. First, in the decisions barring recovery because the carrier

has falsely represented that the shipment was "prepaid," there is an ever-present element of "double payment," since the consignee typically has already paid the consignor the freight charge in reliance on the carrier's representation. The Eighth Circuit, for example, which recognized an estoppel defense in *Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972), reconciled that case with a later decision denying estoppel by stating:

> It seems clear that the anti-discrimination provisions of § 6(7) would not, in any way, be furthered by requiring a consignee to pay the freight charges twice. . . . [I]n *Southern Pacific* the consignee had paid the full amount of the existing tariff but to the wrong person. Here the full amount of the existing tariff has not been paid to the railroad or anyone else.

Chicago, Burlington & Quincy Railroad v. Ready Mixed Concrete Co., 487 F.2d 1263, 1267 (8th Cir. 1973).

In the present case there is nothing in the record to indicate a "double payment" by the consignor.[14] Nor did Southern Pacific make affirmative representations of any kind to Commercial Metals which would have led the shipper to pay the freight charges to another party. Quite the contrary, Commercial Metals' failure to execute the non-recourse clause represented an affirmative undertaking by Commercial Metals to be liable for the freight charges. In short, there are simply no grounds for an estoppel here.

Second, the Fifth Circuit applied the "credit violation" defense to deny recovery to Southern Pacific on all three shipments, despite Southern Pacific's good faith efforts to collect the freight charges by requiring receipt of

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[14] Indeed, the only party doubly affected here is the petitioner, which (1) has been told by the court below it cannot collect any portion of the freight charges from the consignor, but (2) has already paid the other two carriers their proportionate shares.

checks before releasing the latter two freight cars. Acceptance of a check—as was done here—is a recognized commercial practice in the industry. *See Fullerton Lumber Co. v. Chicago, Milwaukee, St. Paul & Pacific Railroad*, 282 U.S. 520, 522 (1931). Thus, the decision below appears to suggest that whenever a carrier fails to collect freight charges on an initial shipment, reasonable commercial practices with respect to subsequent shipments may not be legally sufficient to prevent an estoppel with regard to those shipments.

This is an intolerable state of affairs for the nation's railroads. A single credit violation may entail financial and practical consequences far in excess of its original significance. Moreover, the decision below provides little guidance as to what connection between the initial shipment and subsequent shipments will cause application of this harsh approach, what commercial practices will be viewed as adequate in this situation, or what conduct is necessary to purge the alleged credit violation on the first shipment.

In the context of a national rail transportation system, conflicts between local courts on matters of federal law should not be allowed to proliferate. The conflict with regard to the availability of the credit violation defense has already provoked a substantial amount of unnecessary litigation. Unless certiorari is granted herein, the decision issued by the Fifth Circuit Court of Appeals will undoubtedly increase the attempts to use this defense. Indeed, given the implication of the decision that shippers may be able to avoid liability for all subsequent shipments where credit was not instantaneously cancelled after nonpayment of the first shipment, allegations of credit violations will become even more financially attractive defenses in collection litigation. This Court should put an end to the uncertainty, expense, and delay by resolving these issues in the context of this case.

III. THE DECISION BELOW IS CONTRARY TO THE PURPOSE OF THE CREDIT REGULATIONS

A. These Rules Were Designed to Protect Carriers

The Courts that have recognized the "credit violation" defense have failed to examine closely the history and underlying purposes of the credit provisions of the Interstate Commerce Act. The tendency of these courts has been to state, without citation to any authority, that the sole purpose of the regulations is to prevent discrimination between shippers, and to reason from this premise that a carrier extending credit in violation of the regulations should not be "reward[ed] . . . for its unlawful as well as inequitable conduct." *Consolidated Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d 56, 63 (7th Cir. 1971). Overlooked in this analysis are the clear indications in the legislative and administrative history that a primary purpose of the credit regulations was to *protect carriers* against economic pressure from shippers seeking to delay payment for an unreasonable period. The transformation of these rules into a means by which a shipper is permitted to avoid its liability to a carrier for lawful freight charges perverts their meaning and frustrates the congressional intent reflected in their enactment.

Prior to 1918, the extension of credit by rail carriers was not regulated by the federal government. As a result, there was little uniformity in credit practices, and considerable pressure from shippers to obtain favorable credit terms at the expense of the carriers. In fact, the carriers estimated that as much as $75 million in working capital was tied up in unpaid transportation charges under the practices in effect prior to 1918. *See In re Section 3 of the Interstate Commerce Act, Ex Parte No. 73*, 57 I.C.C. 591, 594 (1920).

During World War I, the Director General of Railroads issued General Order No. 25, which cancelled all existing credit arrangements and put the collection of freight charges on a "cash basis." *Id.* at 593. In practice, this order was interpreted as permitting the carrier to present a freight bill to the shipper simultaneously with or just after delivery for payment in the regular course of business. Circular No. 9, *cited at* 57 I.C.C. at 593-94. Credit could be extended for an additional 48 hours only under certain described circumstances. *Id.*

The benefits of General Order No. 25, according to a later account by the ICC, included a substantial reduction in the amount of money outstanding in carriers' freight bill accounts, savings in labor at stations and elsewhere, the avoidance of discrimination between shippers, and a reduced risk of loss through bankruptcies and otherwise. *Payment of Rates and Charges of Motor Carriers, Ex Parte No. MC-1*, 2 M.C.C. 365, 374 (1937). The order was so successful that when Congress decided to return the railroads to private control, it carried General Order No. 25 over into the Transportation Act of 1920, Pub. L. No. 66-152, § 405, 41 Stat. 479 (amending section 3 of the Interstate Commerce Act):

> From and after July 1, 1920, no carrier by railroad . . . shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination . . . .[15]

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[15] In describing the effect of section 405, the Conference Committee stated: "The . . . provision virtually continues the operation of general order No. 25 of the Railroad Administration as supplemented, relating to the extension of credits by railroads." Report of the Committee on Conference, *reprinted in* III B. Schwartz, The Economic Regulation of Business and Industry 1628, 1640 (1973).

The key provision of the regulations adopted by the ICC under section 3(2)—which has remained largely unchanged to the present time—stated that:

> Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions *deemed by it to be sufficient* to insure payment of the tariff charges within the period of credit herein specified, may relinquish possession of the freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons being herein called shippers, for a period of ninety-six hours . . . .

In re section 3 of the Interstate Commerce Act, Ex Parte No. 73, 57 I.C.C. 591, 597 (1920) (emphasis added). As the language suggests, the purpose of this regulation was to permit the railroads to extend limited credit, on a nondiscriminatory basis, while continuing in effect the protection afforded by General Order No. 25 against shippers' demands for excessive periods of free credit.[16]

An opinion of the Supreme Court of Minnesota, rendered shortly after the regulations went into effect, confirms that the purpose of the rules was to protect carriers and prevent discrimination, rather than to release shippers from liability for freight charges. In *Chicago Junction Railway v. Duluth Log Co.*, 161 Minn. 466, 202 N.W. 24 (1925), the consignor of a freight shipment sought to avoid liability for the freight charge on the ground that section 3(2) released the consignor from liability if

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[16] Statutes patterned after section 3(2) were enacted for motor carriers in 1935, Pub. L. No. 74-255, 49 Stat. 565, § 223, 49 U.S.C. § 323 (1976), and for water carriers in 1940, Pub. L. No. 76-785, 54 Stat. 949, § 318, 49 U.S.C. § 918 (1976). *See* Appendix at 28a to 32a.

the freight was not collected from the consignee at the time of delivery. After discussing the history of General Order No. 25, the Minnesota court concluded:

> The amendment [section 3(2)] was not intended by Congress to put the liability for freight charges solely upon the consignee nor to relieve the consignor from primary liability. The statute had in view something quite different. It wanted to prevent discrimination. This was the purpose of the act amended. It wanted, also, to prevent the capital of the carriers from standing in the form of unpaid charges for transportation and therefore not working capital. Whether the shipper or consignee should pay the freight did not interest it. The Transportation Act did not relieve the consignor from liability for tariff charges.

202 N.W. at 25.[17]

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[17] Similarly, the Court of Civil Appeals of Texas concluded in 1944 that the section of the Act relating to motor carrier extensions of credit had no effect on a consignor's liability to pay the freight charges:

> The Federal Statute forbidding delivery without payment of the freight by the consignee is not intended in any way to affect the contract between consignor and carrier. The consignor would have no right to compel the carrier to deliver without payment of the freight by the consignee. By complying with the law, it may relieve itself from liability for the payment of the freight. Should this be done, it is immaterial to consignor whether the carrier does or does not collect from the consignee. The exaction of freight charges from the consignee before delivery is not intended for the benefit of the consignor, but it is made the duty of the carrier for the protection of the carrier.

East Texas Motor Freight Lines v. Franklin County Distilling Co., 184 S.W.2d 505, 507 (Tex. Civ. App.—El Paso 1944, no writ). *See also* American Red Ball Transit Co. v. McCarthy, 114 N.H. 514, 323 A.2d 897, 899 (1974), *cert. denied*, 420 U.S. 930 (1975); Consolidated Freightways Corp. of Del. v. Eddy, 266 Ore. 385, 513 P.2d 1161, 1166 (1973); Arizona Feeds v. Southern Pac. Transp. Co., 21 Ariz. App. 346, 519 P.2d 199, 207 (1974).

There was no indication at the time of adoption of the credit rules, or at any time thereafter, that they were intended to penalize carriers who violated them by denying recovery of freight charges from shippers who were otherwise primarily liable. In fact, the ICC has made a specific finding, after a careful investigation, that "shippers are the major cause of violations" of the rules. *Regulations for Payment of Rates and Charges, Ex Parte No. 73*, 326 I.C.C. 483, 487 (1966). In light of this finding, and of the clear intent of Congress and the ICC to protect carriers, the "credit violation" defense adopted by the court below is plainly contrary to the statutory policy of section 3(2).

B. The "Credit Violation" Defense Results in Unlawful Discrimination

The "credit violation" defense also undermines the statutory policy of the Interstate Commerce Act against discrimination. Under 49 U.S.C. 10761(a) (Supp. III 1979) (formerly 49 U.S.C. § 6(7)), a "carrier may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device." The manifest purpose of this provision is to prohibit discrimination or preferences. *E.g., Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Fink*, 250 U.S. 577, 581 (1919); *Consolidated Freightways Corp. of Delaware v. Eddy*, 266 Ore. 385, 513 P.2d 1161, 1164 (1973). Under the authority of this provision, it has been held repeatedly that the carrier cannot release a shipper from the obligation to pay the lawful tariff charge even if the carrier initially collects less than the proper rate. *Pittsburgh Railway*, 250 U.S. at 582-83; *Illinois Central Gulf Railroad v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978). "[I]n-

stances of individual hardship," this Court has observed, "cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation." *Pittsburgh Railway*, 250 U.S. at 582.

By virtue of this rule, the carrier is obligated to collect the full freight charge from any party that is liable under the terms of the bill of lading. *Louisville & Nashville Railroad v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924). The form of the bill of lading is prescribed by the ICC, and provides, in section 7, that the consignor is liable for the freight charge unless it stipulates—by executing the non-recourse clause—that the carrier is to collect the charge from the consignee before delivery. As the ICC stated at the time this provision was promulgated:

> A primary right of the carrier in the conduct of its business is that of reasonable compensation for the service rendered by it . . . . The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is entitled to look to the consignor for his charges.

In re Bills of Lading, 52 I.C.C. 671, 721 (1919). Similarly, in *Illinois Steel Co. v. Baltimore & Ohio Railroad*, 320 U.S. 508 (1944), this Court stated:

> [I]f the non-recourse clause is not signed by the consignor, he remains liable to the carrier for all lawful charges. The carrier is free to demand payment in advance by the consignor, or it may decline to make delivery to the consignee until the freight charges are paid or guaranteed, or if delivery is made to the consignee without payment, the consignee is *also* liable for all freight charges.

Id. at 513 (emphasis added). As the last clause of the quoted passage makes clear, it was this Court's opinion that delivery to the consignee without collection of the freight charge does not release the consignor from its primary liability.

Because Commercial Metals failed to execute the non-recourse provision, the action of the court below in precluding recovery from Commercial Metals conflicts with the statutory purpose. Commercial Metals, which obtained the transportation services for its own benefit, has been enriched to the extent of the unpaid freight charges, not because of any aspect of its dealings with the carrier, but solely because the carrier violated the credit regulations in attempting to collect from the consignee. This is just the sort of windfall, benefiting one shipper but not its competitors, which the Interstate Commerce Act was meant to prevent.

C. Other, More Appropriate Remedies Exist For Violations of the Credit Regulations

The court below, like the other courts recognizing the "credit violation" defense, failed to take into account the alternative remedies by which the ICC and the courts have sought to enforce compliance with the credit regulations. These remedies include cease and desist orders issued by the ICC, *Shaw Warehouse Co. v. Southern Railway*, 308 I.C.C. 609, 633-34, 637 (1959), injunctive suits by the ICC requiring carriers to comply with the regulations, *Interstate Commerce Commission v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974), and civil forfeitures of $5,000 per violation under 49 U.S.C. § 11901(a) (Supp. III 1979) for knowing violations of the credit regulations, *United States v. Western Pacific Railroad*, 385 F.2d 161 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *United States v. Pennsylvania Railroad*, 308 F. Supp. 293 (E.D. Pa. 1969). As the Court of Appeals for the Tenth Circuit has commented, "The statute and the rules are exercises in futility unless some means is pro-

vided for enforcement. Section 16(8) and (9) [the civil forfeiture provisions now codified at 49 U.S.C. § 11901] provide *the means.*" *United States v. Western Pacific Railroad*, 385 F.2d 161, 163 (10th Cir. 1967) (emphasis added). In view of these specific statutory remedies for credit violations, the adoption of a further remedy which is not mentioned in the statute or the rules, and which runs counter to the legislative intent of these provisions, is truly anomalous.

In short, the purposes of the credit regulations were to prevent the discriminatory extension of credit and to protect the working capital of the carrier. Permitting a shipper to invoke these regulations to avoid paying lawful freight charges inverts the intention behind the rules. Because the lower courts are deeply split on this important question, a decision by this Court is urgently needed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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September 28, 1981

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-1843

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellant,
v.
COMMERCIAL METALS COMPANY,
Defendant-Appellee.

March 30, 1981

Appeal from the United States District Court
for the Northern District of Texas

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

TJOFLAT, Circuit Judge:

The sole question presented by this appeal is whether the failure of a carrier to comply with credit regulations promulgated under the Interstate Commerce Act is a defense available to a consignor in an action by the carrier against a consignor who failed to execute a nonrecourse provision in the relevant bill of lading. The district court found the carrier's failure to be a valid defense; we affirm.

I

The facts in this case are not in dispute. On April 11, 1974, Commercial Metals Co. (Commercial) tendered one railcar of steel cobble to Penn Central Transportation Company for shipment to the designated consignee,

Carco Steel Corporation (Carco). When arranging for shipment, Commercial did not execute the nonrecourse provision in the applicable bill of lading. This railcar was delivered by Southern Pacific Transportation, the last in a succession of carriers, to Carco on April 25, 1974. The railcar was released to Carco without collection of the shipping charges. Prior to delivery Southern Pacific did not investigate Carco's credit worthiness.

On May 2, 1974, Commercial tendered two more railcars of steel cobble to Penn Central for shipment to Carco as consignee. When arranging for shipment, Commercial once again failed to execute the nonrecourse provision in the bills of lading. Soon thereafter, Southern Pacific Transportation delivered these railcars to Carco. At the time of their delivery, Carco had still not paid the freight charges on the first railcar of steel. Nevertheless, on May 16, 1974, Southern Pacific released these two railcars to Carco on receipt of two checks. The total amount tendered to Southern Pacific at that time was approximately $900 short of the sum actually due for shipping the last two cars; Carco made no offer to pay the sum due for shipment of the first railcar. The checks Carco tendered were dishonored by Carco's bank.

Southern Pacific subsequently attempted to recover all sums due it from Carco, but was unable to do so. Two years and seven months later, Southern Pacific made demand on Commercial for payment of the shipping charges. Commercial refused to pay, and Southern Pacific commenced this action in the district court.

II

[1] It is clear that "ordinarily the shipper is presumed primarily liable to the carrier for freight charges for the transportation of goods." *O'Boyle Tank Lines, Inc. v. Beckham*, 616 F.2d 207, 209 (5th Cir. 1980). Although this presumption may be modified by contract,

id., Commercial's failure to execute the nonrecourse provision of the bill of lading is a clear indication that Commercial was to be primarily liable for the cost of shipping these three railcars. *Illinois Steel Co. v. Baltimore & Ohio Railroad Co.*, 320 U.S. 508, 513, 64 S.Ct. 322, 325, 88 L.Ed. 259 (1944). Moreover, it is undisputed that Southern Pacific did deliver the railcars to Carco and has subsequently instituted this suit against Commercial within the applicable statute of limitations. Thus, in the absence of a valid defense, Commercial must be held liable to Southern Pacific for the freight charges.

[2] Section 3(2) of the Interstate Commerce Act, however, is a barrier to Southern Pacific's collection of the charges. That section reads in pertinent part:

> No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . .

49 U.S.C. § 3(2) (1976). The regulations promulgated under the Act modify this statutory mandate by allowing for delivery of freight on credit. The terms under which credit may be extended, however, are quite strict. The applicable regulation reads:

> The carrier, *upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified* in this part, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 4 days

> (or 5 days where retention or possession of freight by the carrier until tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part.

49 C.F.R. § 1320.1 (1979) (emphasis added).

As the facts of this case reveal, and as the parties agree, Southern Pacific failed to comply with section 3(2) of the Act by extending credit to Carco, without adequate precautions, for a period in excess of that provided for in the applicable regulation. The only question, therefore, is whether Southern Pacific's failure in this regard should constitute a defense to Commercial in Southern Pacific's action for the freight charges. The district court held that Southern Pacific's failure was a defense, and we agree.

Consolidated Freightways Corp. of Delaware v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971), presents a closely analogous situation. In that case, Admiral Corporation was consignee on bills of lading executed by a freight forwarder as consignor. This consignor marked the bills of lading "prepaid," which indicated that the carrier was to bill the consignor. After the goods were delivered to Admiral, the carrier billed the consignor for freight charges. The consignor, who had obtained credit from the carrier for a period beyond that allowed by the applicable regulations, failed to tender payment. The carrier then attempted to secure payment from Admiral. The court held that the carrier's "unlawful conduct in violating the [relevant] credit regulations," *id* at 63, precluded the carrier from recovering from Admiral. The court stressed that "[p]ermitting [the carrier to recover] in this case would serve only to reward the carrier for its unlawful as well as inequitable conduct." *Id. Accord, Brown Transportation Corp. v. Atcon, Inc.*, 144 Ga. App. 301, 241, S.E.2d 15 (1977),

cert. denied, 439 U.S. 1014, 99 S.Ct. 626, 58 L.Ed.2d 687 (1978); *Allied Van Lines Inc. v. Hanson*, 131 Ga. App. 506, 206 S.E.2d 108 (1974); *Aero Mayflower Transit Co., Inc. v. Harbin*, 126 Ga. App. 72, 190 S.E.2d 91 (1972); *Checker Van Lines v. Siltek International, Ltd.*, 169 N.J. Super. 102, 404 A.2d 333 (1979).

In the face of this authority, Southern Pacific has offered two reasons why its failure to comply with the ICC credit regulations should not preclude its recovery of freight charges. First, it argues that if the defense is allowed, the freight charges will not be paid, and nonpayment will violate the Interstate Commerce Act's clear prohibition of rate discrimination. Section 6(7) of the Act provides:

> No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

49 U.S.C. § 6(7) (1976). Southern Pacific's argument is that allowing Commercial to avoid paying freight charges will, in effect, extend to Commercial a rate privilege, tantamount to a rate exemption, which clearly violates

the Interstate Commerce Act's prohibition of all rate discrimination. Furthermore, Southern Pacific argues that when a pricing arrangement is discriminatory, the Act allows no defenses in an action designed to rectify that discrimination, regardless of the carrier's conduct.

It is true that the primary purpose of the Interstate Commerce Act was to achieve uniformity in freight transportation charges and therefore to eliminate rate discrimination. *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978). As the Supreme Court has stated, the purpose of the Act was to achieve "but one rate, open to all alike, and from which there could be no departure." *Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 112, 34 S.Ct. 526, 528, 58 L.Ed. 868 (1914). *See also Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919). It is also true that, in light of this Congressional intent, courts have been quite reluctant to allow defenses to a carrier's claim for freight charges. *See Illinois Central Gulf Railroad, Co.*, 586 F.2d at 592. Thus, for example, when a carrier negligently undercharged a shipper of goods and then, upon discovering the error, sought to recover the balance, the Supreme Court refused to allow the shipper to use the carrier's initial failure to charge the proper rate as a defense. *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., supra.*

It is not appropriate, however, to rely on section 6 (7) of the Act and cases such as *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., supra,* to justify an absolute prohibition of defenses to a carrier's action against a shipper for freight charges. In each case the court must consider whether, under the circumstances presented, allowing the defense would undermine the purpose of the Interstate Commerce Act. The proper inquiry, then, is whether our recognition of the defense offered by Commercial in this case "will serve directly

or indirectly as a cover for freight rate discrimination." *Chicago, Burlington & Quincy Railroad Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973). *See also In re Penn Central Transportation Co.*, 477 F.2d 841, 844 (3d Cir.), *aff'd*, 414 U.S. 885, 94 S.Ct. 231, 38 L.Ed.2d 137 (1973); *Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219, 1222 (8th Cir. 1972).

The facts of this case do not reveal a situation in which denial of recovery to the carrier will serve as a cover for rate discrimination. Commercial was not extended a preferential rate, nor is there any evidence that the company contracted for or otherwise sought such a rate. "The full rate was charged. The only unlawful discrimination was the plaintiff's extension of credit . . . ." *Consolidated Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d at 63. Neither party denies that Southern Pacific could and should have demanded full payment for the freight charges from Carco, and that, initially, Southern Pacific could also have asserted the same claim against Commercial. "So long as payment of the full tariff charges may be demanded from some party, the antidiscrimination policy of the [Act] is satisfied." *Id.* at 62. In the absence of a specifically applicable Congressional mandate, we refuse to transform the Act's anti-discrimination provision into "a sword to insure collection in every instance and a shield to insulate the carrier from the legal consequences of otherwise negligent or inequitable conduct." *Id.* Here, there was no attempt to achieve rate discrimination; the only discrimination that occurred was Southern Pacific's extension of specifically prohibited credit terms to Carco. It would indeed be anomalous to allow Southern Pacific to recover despite its conduct. The integrity of the Act is not eroded by barring Southern Pacific's recovery.

Southern Pacific offers a second argument to void Commercial's defense in this action. It claims that those

courts that have allowed defenses to a carrier's action for freight charges based upon the conduct of the carrier have done so only because the party from whom recovery was sought had already paid the shipping charge, albeit to someone other than the carrier. Thus, the defense asserted by Commercial should only be allowed if Commercial had prepaid Carco for the freight charge. The defense, in other words, should be allowed only to preclude double payment of freight charges.

Southern Pacific is on solid ground when it asserts that the cases Commercial relies on, such as *Admiral Corp.*, *supra*, and the Georgia cases cited Slip op. 5388, at ——, *supra*, are factually distinguishable from the case at bar. In these cases the defending party paid the shipping charge, pursuant to contract, to someone other than the carrier, and the carrier understood, or should have understood this arrangement. Nevertheless, we believe this distinction is one, of degree only; assuredly, holding Commercial liable if it had prepaid the freight charges would work an injustice. It does not necessarily follow, however, that holding Commercial liable here absent prepayment would not also be unjust, when its inquiry is solely the result of the improper and illegal business practices of Southern Pacific. "In this case a carrier seeks to extend the protective policy of the [Interstate Commerce Act] in order to be held harmless from credit losses resulting directly from its own flagrant disregard of regulations promulgated under the statute." *Consolidated Freightways Corp. of Delaware*, 442 F.2d at 65 (Stevens, J., concurring). Under these circumstances, we are compelled to hold that the carrier's failure to comply with the applicable ICC regulations is a defense, available to Commercial, in an action by the carrier for unpaid freight charges.

For these reasons, we affirm the decision of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1843

D.C. Docket No. CA 3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellant,

versus

COMMERCIAL METALS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before TJOFLAT, POLITZ AND HATCHETT, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 30, 1981

ISSUED AS MANDATE: June 29, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1843

[Filed: June 29, 1981]

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellant,
versus
COMMERCIAL METALS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion March 30, 1981, 5th Cir., 1981, —— F.2d ——)

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

PER CURIAM:

The parties having petitioned for Rehearing En Banc and a member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

79-1843

[Filed: July 21, 1981]

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellant,
versus
COMMERCIAL METALS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant for leave to file a petition for panel rehearing out of time is GRANTED, and the petition for panel rehearing DENIED.

IT IS FURTHER ORDERED that appellant's request for recall and stay of the mandate pending petition for certiorari is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION CO.

vs.

COMMERCIAL METALS CO.

MEMORANDUM OPINION

This case is submitted to the Court on stipulated facts, and a copy of the stipulated facts is attached to this memorandum opinion. Plaintiff Southern Pacific Transportation Co. seeks to recover from defendant Commercial Metals certain freight charges which were not paid by the designated consignee (Carco Steel Corporation) of certain shipments of steel cobble. The freight charges amount to $13,679.56. Plaintiff first attempted to recover the freight charges from the consignee Carco. Unable to do so, it then turned to defendant, as consignor, to recover such charges.

Defendant alleges that recovery of the freight charges from Commercial Metals Co. is barred by the doctrine of laches and estoppel. Defendant notes that for a period of over 31 months after delivery, the defendant was not notified of any problem whatsoever by the Penn Central Transportation Co. or the plaintiff in regard to collection of the freight charges. Defendant also notes that Carco, the consignor, was not a credit patron of Southern Pacific Railroad, had never applied for credit to that railroad, and that railroad had never investigated the credit worthiness of Carco. Disregarding the requirement that the railroad not release the shipment until the tariff rate had been collected [49 U.S.C. § 3(2)] the railroad released the first car of steel cobble to Carco without col-

lecting any charge. The last two rail cars were released to Carco at a time when the railroad's freight bill to Carco was still outstanding, unpaid, and past due. Despite the unpaid freight charge on the first car, the railroad accepted a partial payment of the charges on the last two cars and released those cars on May 16, 1974. Defendant argues that this manner of releasing the shipments to the care of Carco is not in compliance with 49 U.S.C. § 3(2) and § 1320.1 of the regulations promulgated under the Act by the ICC and found at 49 C.F.R. § 1320-1329. Defendant also argues that it entered into a shipping contract with the Penn Central Transportation Co., and Southern Pacific was only a connecting shipper. Defendant argues that plaintiff has failed to show what right or authority it has to sue on a contract to which it was not a party.

Plaintiff may maintain this action against Commercial Metals. The allegations in this case are comparable to those considered by the Court in *Pennsylvania Railroad Co. v. Green*, 173 F.Supp. 657 (S.D. Ala. 1959). In that case the plaintiff railroad company sought to recover freight charges from the defendant. The defendant contended that the action could not be maintained by the plaintiff, the terminal carrier, because no privity of contract existed since the original agreement was entered into between the defendant and the initial carrier, the Louisville and Nashville Railroad. The Court rejected defendant's claim, holding that the plaintiff, as the final carrier of the freight, was entitled to collect the freight charges from its proceeding carriers.

Plaintiff has established a prima facie case for the recovery of the freight charges from defendant. Plaintiff is a common carrier which delivered three carloads of steel to the designated consignee. The charges sought from defendant by plaintiff are correct and in accord with applicable tariffs and none of the freight charges have

been recovered by plaintiff from defendant or anyone else. Plaintiff attempted to collect the charges from Carco, and failed to do so. Absent a showing of valid and affirmative defenses, defendant is liable to plaintiff for the freight charges.

I reject the defendant's claim that plaintiff's delay in seeking to recover from the defendant bars the plaintiff's recovery in this case. Although defendant had no notice that the freight charges had not been paid until a letter dated December 17, 1976, nearly two and one-half years after the delivery of the shipments in 1974, the applicable statute of limitations is three years and during the two and one-half year period plaintiff had been making efforts to locate Carco and receive payment from Carco. *See St. Louis & San Francisco Ry. Co. v. Miller Floors, Inc.*, 293 F.Supp. 869, 871, (W.D. Okla. 1968).

The Court reaches a different conclusion, however, in considering defendant's argument regarding the plaintiff's failure to comply with the regulations promulgated by the ICC. Section 1320.1 of the regulations promulgated under the Act by the ICC and found at 49 C.F.R. § 1320-1329 authorizes the carrier to relinquish possession of freight "upon taking precautions deemed by it to be sufficient to insure payment of the tariff charges within the credit period specified in this part. . ." Railroads are required to collect freight charges within a period of four or five days. A review of the stipulated facts makes it clear that the plaintiff ignored these rules and granted preferential credit terms to Carco. The railroad's actions in releasing the last two cars on May 16 while apparently ignoring the outstanding freight bill for the first car and accepting less than full payment by means of a check backed by insufficient funds from a consignee whose credit worthiness the railroad had never ever investigated bar plaintiff's recovery of the freight charges in this

action. Defendant has established a valid, equitable, defense to the collection of the freight charges.

Plaintiff argues that defendant failed to avail itself of the contractual opportunity to relieve itself of liability for the freight charges sought in this case by failing to execute the Section 7 "non-recourse" provision contained in each of the three bills of lading involved herein. If the non-recourse clause is not signed by the consignor, the consignor remains liable to the carrier for all lawful charges. *Illinois Steel Co. v. Baltimore & Ohio Ry. Co.*, 320 U.S. 508, 513 (1944). While it is true that the defendant did not sign the "non-recourse" provision, defendant does not need the benefit of the "non-recourse" provision to establish its equitable defense.

In *East Texas Motor Freight Lines vs. Franklin County Distilling Co.*, 184 S.W. 2d 505, 507 (Tex. Civ. App. — — El Paso 1944, no writ) the Court held that:

> The consignor of freight under a bill of lading, such as is here in question, failing to sign the non-recourse provision, is liable for the legitimate freight charges on this shipment. This is true even though the carrier makes delivery in violation of Section 323 of Title 29, U.S.C.C., and violates the rules of the Commission as to extending credit to the consignee, or fails to show that it complied with the rules of the Commission relative to the extension of credit to the consignee.

I disagree with the conclusion reached by the Court in *East Texas Motor Freight Lines*. The loss sustained by the plaintiff was due entirely to its own fault and negligence by failing to take the proper credit precautions when it delivered the goods to Carco. The precautions taken by the plaintiff were not sufficient to insure payment of the tariff charges within the credit period; in fact, no precautions were taken. While other courts may

disagree, I think that it is fundamentally unfair and inequitable for the defendant in this case to pay for the gross negligence of the plaintiff.

Plaintiff shall take nothing in its suit against Commercial Metals Co., and I will enter judgment for the defendant.

It is so ORDERED.

United States District Judge

DATE: February 26, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION CO.

vs.

COMMERCIAL METALS CO.

JUDGMENT

It is hereby ORDERED that the plaintiff shall take nothing in this case. Each party shall bear its own costs.

It is so ORDERED.

United States District Judge

DATE: February 26, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION CO.
Plaintiff,

vs.

COMMERCIAL METALS COMPANY,
Defendant.

STIPULATION OF FACTS

TO THE HONORABLE JUDGE OF SAID COURT:

For any and all purposes in connection with the foregoing Civil Action No. CA-3-77-0467-F, Plaintiff, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and Defendant, COMMERCIAL METALS COMPANY, admit and stipulate to the following Facts:

1. That Plaintiff, Southern Pacific Transportation Company ("Southern Pacific"), a Delaware corporation with its principal place of business in San Francisco, California is a common carrier by railroad subject to the provisions of Part I of the Interstate Commerce Act, as amended, as an initial, connecting and delivering carrier of goods and freight in interstate commerce at points along the lines of railroad over which it operates and was so operating as a common carrier by railroad in interstate commerce at all times pertinent to this action.

2. That Defendant, Commercial Metals Company ("Commercial Metals"), is a Delaware corporation with its principal place of business in Dallas, Texas.

3. That this Court has in personam jurisdiction over the parties.

4. That by virtue of 28 U.S.C. Section 1337, this Court has subject matter jurisdiction since Plaintiff's action seeks to recover freight charges due and owing which the Southern Pacific alleges it is required to collect pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C. Sections 2, 3(1) and 6(7).

5. That Defendant is liable for the debts incurred by or through its Detroit, Michigan office.

6. The three bills of lading involved herein, Waybills Nos. 115119, 152363 and 152364, which are contained in Hillman deposition Exhibits 1, 2 and 3 on file herein, are in evidence for all purposes.

7. Commercial Metals Company did not execute the Section 7 non-recourse provision contained in any of the three bills of lading, Waybills Nos. 115119, 152363 and 152364, involved in the shipments for which freight charges are sought.

8. That the amount of freight charges sought by Plaintiff, $13,679.56 (comprised of the freight charges described in e.g. items #18 and #24, *infra*) is correct and in accord with the then applicable rates under the duly published and governing tariffs on file with the Interstate Commerce Commission at all pertinent times.

9. That in regard to the freight charges sought by Plaintiff herein, Plaintiff has paid, by interline settlements, the initial carrier, the Penn Central Transportation Company, and the connecting carrier, St. Louis Southwestern Railway Company, the proportionate shares of such freight charges earned by each.

10. The three cars involved were delivered to the designated consignee, Carco Steel Corporation ("Carco"), in Alhambra, California. The three cars were the only cars ever delivered to Carco by the Plaintiff.

11. Carco was not a credit patron of Plaintiff; Carco had never applied to Plaintiff for credit; Plaintiff had never investigated the creditworthiness of Carco.

12. Neither Defendant nor anyone else has paid any of the freight charges wought [sic] herein by Plaintiff.

13. Plaintiff received and deposited two checks from Carco, consignee, in the amounts of $2,383.67 and $5,761.79 as payment for the freight charges on the last two of the three cars shipped to consignee Carco. The two checks were not paid but were returned to Plaintiff because of insufficient funds in Carco's account.

CHRONOLOGY OF EVENTS

14. April 11, 1974—Tender of the first railcar of 136,190 pounds of steel cobble by the Detroit office of Commercial Metals to the Penn Central Transportation Company ("Penn Central") for shipment to the designated consignee, Carco in Alhambra, California, Waybill #155119 and Car EJE 81049. (Part of Hillman Exhibit #1).

15. April 23, 1974—Car EJE 81049 was received in the destination rail yard of Plaintiff.

16. April 25, 1974—Car EJE 81049 delivered to Carco at 6:00 a.m. and was released to Plaintiff April 26, 1974, at 5:00 p.m.

17. Car EJE 81049 was delivered by Plaintiff to Carco without the freight charge being collected.

18. April 25, 1974—Freight bill 563707 in the amount of $4,634.11, for freight charges incurred in connection with car EJE 81049, was issued by Plaintiff and mailed to Carco.

19. May 2, 1974—Tender of the last two railcars of steel cobble weighing 169,002 pounds and 96,315 pounds by the Detroit, Michigan office of Commercial Metals to the Penn Central for shipment to the designated con-

signee, Carco. Waybills #152363 and #152364 (parts of Hillman Exhibits #2 and #3), Cars EL 44588 and PC 545844.

20. May 14, 1974—Cars EL 44588 and PC 545844 were received in the destination rail yard of Plaintiff.

21. May 16, 1974—Plaintiff received and deposited two checks from Carco, #2120 and #2121, dated May 14, 1974, for $2,383.67 and $5,761.79, which were given to Plaintiff in payment for the release of Cars EL 44588 and PC 545844.

22. May 16, 1974—Cars EL 44588 and PC 545844 were delivered to Carco at 6:00 a.m. and released to Plaintiff at 5:00 p.m. the same date.

23. Sometime between May 20, 1974 and May 28, 1974, Plaintiff was advised by Carco's bank that the two checks received (see Item #21, *supra*) would not be honored.

24. May 20, 1974—Freight bill #581511 in the amount of $5,761.79 and freight bill #581852 in the amount of $3,283.66 were issued to Carco by Plaintiff.

25. May 28, 1974 through June 6, 1974—Plaintiff communicated with the Penn Central in Detroit concerning Carco's claim that one of the shipments of steel was to have been made freight prepaid.

26. June 20, 1974—Footnote to telegram from G.W. Kruger, a credit representative in Plaintiff's treasury department to various persons in Plaintiff's organization, indicating that the owner of Carco had been avoiding the railroad's accounting department representative who was attempting to have the checks from Carco redeposited.

27. June 27, 1974—Plaintiff's documents concerning the fright charges and related matters were forwarded from the Los Angeles Zone Office to its legal department in San Francisco for collection.

28. August 5, 1974—Letter from Walt A. Steiger, attorney for Southern Pacific, to Carco requesting payment of freight charges in the amount of $13,679.56.

29. August 23, 1974—Complaint and Summons in action styled *Southern Pacific Transportation Company v. Carco Steel Corporation*, et al, #C98004 filed by Plaintiff in Superior Court of California, Los Angeles County.

30. August 29, 1974—Letter from Walt A. Steiger, to J.E. Cole, special agent for Plaintiff, requesting that he serve the Summons and Complaint upon Carco.

31. October 7, 1974—Letter from Carl Fidler, president of Carco, to Walt A. Steiger, stating that the steel was received by Carco in damaged condition.

32. October 16, 1974—Letter from Walter A. Steiger to Carl Fidler responding to the latter's letter of October 7, 1974. Steiger stated therein that he could not determine who at Southern Pacific Fidler had contacted regarding damage claim; that if the lading was damaged, Fidler should file a claim in writing with Plaintiff's freight claim agent.

33. October 17, 1974—Letter from Walter C. Kutscher of Carco to Steiger in response to the latter's letter of October 16, 1974. Kutscher suggests that a written claim regarding freight damage was sent to Plaintiff. He further states that Carco would not cooperate further in light of Plaintiff's pending lawsuit against Carco.

34. October 21, 1974—Letter from M. W. Copeland, Assistant Freight Claim Agent of Plaintiff, to William E. Still (in Steiger's office) indicating that no freight damage claims had been received from Carco and that there was no record of Carco requesting that Plaintiff inspect the three cars involved.

35. October 23, 1974—Letter from Steiger to Kutscher advising him of the information received from the freight department (see #33, *supra*).

36. February 26, 1975—Letter from J. J. Cavanaugh, investigator in the office of J. E. Cole, to C. W. Champlin (in Steiger's office). Cavanaugh stated therein that, upon receipt of the file from Cole per letter of August 29, 1974, he had attempted to serve Carl Fidler, president of Carco, with the Summons and Complaint. He stated further that he called on Carco's place of business at all hours of the day and on each occasion was told that Fidler was out of town or somewhere else out of the office and that the receptionist had no idea when he would return. Cavanaugh concluded that Fidler was making every effort to avoid service and that it would be necessary to employ another method of service.

37. March 17, 1975—Request from Steiger's office to Los Angeles County sheriff requesting service of Summons and Complaint upon Carco.

38. April 21, 1975—Report from Los Angeles County sheriff indicating inability to effect personal service upon Carco.

39. April 25, 1975—Letter from Steiger to California Secretary of State concerning Carco, whether it was a California corporation, its designated agent for service, etc.

40. May 2, 1975—Response from Secretary of State of California to Steiger's April 25, 1975 letter. Indicated that Carco was a California corporation, with its principal office in Los Angeles County and that it did not have a registered agent for services of process.

41. December 17, 1976—Letter from J. M. Corbet, acting manager of Plaintiff's Los Angeles zone office, to Defendant requesting payment of the freight charges in the amount of $13,679.56 as a result of Plaintiff's inability to collect the freight charges from Carco together with Defendant's failure to execute the Section 7 nonrecourse provisions in the bills of lading. Copies of the three freight bills were enclosed. This was the first no-

tice to Defendant that the freight had not been collected from Carco.

42. January 21, 1977—Letter from J. C. Corbet to Defendant enclosing letter (with enclosures) of December 17, 1976, and repeating request that Defendant pay the uncollected freight charges.

43. March 11, 1977—Letter from Steiger to Kraut & Schneider, Inc. in Los Angeles, private investigators, requesting that they undertake to serve the Summons and Complaint (in the action described in item #29, *supra*).

44. April 8, 1977—*Southern Pacific Transportation Co. v. Commercial Metals Co.*, CA3770467F filed in the U.S. District Court, N.D. Tex., Dallas Division.

45. April 27, 1977—Letter from Kraut & Schneider, Inc. to Plaintiff with report of their unsuccessful efforts to effect service of Summons and Complaint, together with their bill in the amount of $486.60.

Respectfully submitted,

WORSHAM, FORSYTHE & SAMPLES

By _____

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By _____

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Attorney for Defendant

Section 3(2) of the Interstate Commerce Act, 49 U.S.C. 3(2) (1976), prior to recodification in 1978, provided as follows:

> (2) *Payment of freight as prerequisite to delivery*
>
> No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be construed to prohibit any carrier or express company from extending credit in connection with rates and charges on freight or express shipments transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned

or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this title or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within the period provided in paragraph (3) of section 16 of this title. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this title or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within the period provided in paragraph (3) of section 16 of this title. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has

given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges, and an action for the enforcement of his liability may be begun within the same period provided in the case of an action against a consignee who has given erroneous information as to the beneficial owner.

Section 1320.1 of the regulations of the Interstate Commerce Commission, 49 C.F.R. § 1320.1 (1980), provides as follows:

§ 1320.1 *Carrier may extend credit to shipper.*

The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 4 days (or 5 days where retention or possession of freight by the carrier until tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part. In regard to traffic of nonprofit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the carriers shall require such organizations to furnish the names of the beneficial owners of the property in the bills of lading or at least have the bills of lading incorporate by reference a document containing the names of the beneficial owners.

Section 323 of the Interstate Commerce Act, 49 U.S.C. § 323 (1976), prior to recodification in 1978, provided as follows:

§ 323. *Collection of rates and charges; extension of credit; liability of agent of beneficial owner*

No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice: *Provided*, That the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory, or political subdivision thereof, or for the District of Columbia. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and had no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the benficial owner of the

property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith.

Section 1322.1(a) of the regulations of the Interstate Commerce Commission, 49 C.F.R. § 1322.1(a) (1980) provides as follows:

1322.1 *Carrier may extend credit to shipper.*

(a) Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor may relinquish possession of freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days excluding Saturdays, Sundays, and legal holidays. When the freight bill covering a shipment is presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following delivery of the freight. When the freight bill is not presented to the shipper on or before the date of delivery, the credit period

shall run from the first 12 o'clock midnight following the presentation of the freight bill. In regard to traffic of nonprofit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the carriers shall require such organizations to furnish the names of the beneficial owners of the property in the bills of lading incorporate by reference a document containing the names of the beneficial owners.

Section 918 of the Interstate Commerce Act, 49 U.S.C. § 918 (1976), prior to recodification in 1978, provided as follows:

§ 918. *Collection of rates and charges*

No common carrier by water shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for periodic settlement, and to prevent unjust discrimination or undue preference or prejudice: *Provided*, That the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where such carrier is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of de-

livery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (1) is an agent only and had no beneficial title in the property, and (2) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made or handled. An action for the enforcement of such liability may be begun within two years from the time the cause of action accrues, or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within said period. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. An action for the enforcement of such liability may be begun within two years from the time the cause of action accrues, or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within said period. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said bene-

ficial owner shall be liable for all legally applicable charges in connection therewith.

Section 1323.1 of the regulations of the Interstate Commerce Commision, 49 C.F.R.§ 1323.1 (1980), provides as follows:

§ 1323.1 *Relinquishment of freight in advance of payment of charges.*

All common carriers of property by water subject to Part III of the Interstate Commerce Act, after having taken precautions deemed by them to be sufficient to assure payment of their freight charges within the credit periods hereinafter specified, such as examination of the credit rating of the person or persons undertaking to pay the freight charges or the obtaining of satisfactory surety bonds, are hereby authorized to relinquish possession of freight at destinations or in advanvce of the payment of the tariff charges lawfully due thereon and to extend credit to those who undertake to pay such charges, as hereinafter authorized.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 6814 (VLB)

CONSOLIDATED RAIL CORPORATION,
Plaintiff,

-against-

CONTAINAIR SYSTEMS CORPORATION,
Defendant.

MEMORANDUM ORDER

VINCENT L. BRODERICK, U.S.D.J.

I.

Introduction

The plaintiff railroad ("Conrail") has invoked the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (1980), to recover payment of detention and storage charges allegedly owed to it by the defendant corporation ("Containair").

The parties have stipulated the material facts and each has moved for summary judgment. For the reasons set forth below, upon the stipulated facts plaintiff's motion for summary judgment is granted, and defendant's motion is denied.

II.

The Facts

The storage and detention charges involved in this action were made in connection with 18 container shipments that were transported by Conrail in interstate

commerce. Containair was the consignee or beneficial owner of each of these shipments.

After each shipment arrived at the Conrail rail yards at Portside, New Jersey, Containair was notified of the availability of the shipment. Containair then retrieved the trailers containing the shipment from the Conrail facility; the trailers were subsequently returned to the yards.

Each of these transactions was documented by the execution of a "Trailer/Container Use Agreement," which contained the terms and conditions governing the use of the trailers. These forms were used to record the dates when the trailers were picked up and returned. The agreement also specified that applicable tariffs would provide the basis for calculating charges, but it did not specifically enumerate these charges:

> . . . User agrees to pay Consolidated Rail Corporation for use of the trailer accepted hereby the amount currently designa[ted] by applicable tariffs, supplements thereto or reissues thereof. Consolidated Rail Corporation will render bills currently [for] the applicable charges and the User will make payments in accordance with established credit regulations.

The form contained a space for "detention charges," in which Conrail later inserted the amount of such charges; in a space marked "other charges," it later supplied the charge for storage.

After the charges were calculated, Conrail eventually presented Containair with bills for the storage and detention charges.

The bill dates were, in some instances, considerably after the end of the storage period.[1] The charges made

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[1] For example, the storage of one shipment ended on June 26, 1979, but the bill date was March 29, 1980.

on these bills, which amounted to a total of $15,152.60, were inposed in accordance with the legal tariffs on file with the Interstate Commerce Commission. Defendant does not contend that the services to which these bills pertain were not rendered.

III.

Discussion

Although it concedes that the charges accurately reflect the governing tariffs, Containair contends that it should be excused from paying because it was not properly informed of the rates for storage and detention and because it was not billed by Conrail in a timely manner.

Before addressing the merits of these defenses, it is necessary to place this litigation in perspective. This is not an ordinary action for services rendered. Liability must be determined in accordance with the clearly defined purposes of the Interstate Commerce Act, the central objective of which is to guard against rate discrimination in the transportation industry. *See, e.g. Midstate Horticultural Co., Inc.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356, 361 (1943) ("The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates."). In enforcing this policy, the courts have exhibited extraordinary deference to the terms of published tariffs, and have applied them strictly, even where a carrier has misrepresented rates or has otherwise acted inequitably. *See, e.g., Louisville and Nashville Railroad Company* v. *Maxwell*, 237 U.S. 94 (1915); *Illinois Central Gulf Railroad Company* v. *Golden Triangle Wholesale Gas Company*, 586 F.2d 588 (5th Cir. 1976) (*"Golden Triangle"*); *In Re Penn Central Transportation Company*, 477 F.2d 841, 844 (3rd Cir.), *aff'd sub nom. United States Steel Corp.*

v. *Trustees of Penn Central Transportation Co.*, 414 U.S. 885 (1973).

The Fifth Circuit has summarized the well established law in this area:

> [F]iled tariffs have the force of law, . . . and establish the liability of a recipient of services covered by the tariff, even if the recipient was quoted a different price . . . or was a party to a contract under which the services were to be provided at a different price . . . A carrier cannot waive or modify legally applicable tariffs . . . and individual hardship is not a defense to the application of such tariffs . . . Equitable considerations cannot justify a carrier's failure to collect authorized tariff charges.

Golden Triangle, supra, 586 F.2d at 592 (citations omitted). By enforcing tariffs with unwavering diligence, the courts have assured that rate discrimination cannot be conducted in subtle forms. "In limiting the defenses available to a shipper in an action to recover tariff charges, courts have expressed concern that the parties may seek through sham devices to avoid application of the tariffs." *Consolidated Rail Corp.* v. *Standard Milling Co.*, 508 F. Supp. 277, 279 (W.D.N.Y. 1981). It is against this background that Containair's defenses must be evaluated.

The defendant argues that it is not obligated to pay because it was never informed of the rates that would be charged for detention of the trailers and that the Trailer/Use Agreement did not specifically refer to "storage charges." It is true that the tariffs require the carrier to execute an agreement "on a form to be furnished by rail carrier, covering utilization of trailer" by the consignee.[2] And it is also true that the agreement executed by the parties in this case did not enumerate

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[2] See Traffic Executive Association, Tariff 838-A, Item 570(9).

the rates charged for detention and storage. Although the agreement did incorporate applicable tariffs by reference, Containair contends that it was not enough to allude to the tariffs in the agreement but that Conrail should have been able to quote the precise rate to Containair. It also contends that, because the tariffs were difficult or expensive for a relatively small shipper to obtain, Conrail had a duty to provide the tariff information directly to the customer.

As a matter of equity, it may be that a railroad should be able to provide a customer with the rates it is charging, so that the customer can plan its expenditures. There is an obligation for a carrier to post its rates.[3] But even assuming that Conrail somehow violated its obligation of disclosure[4]—a finding which I need not make—there simply is no authority to permit a customer to avoid tariff-imposed charges because the rates were not disclosed by a branch office of a railroad. Indeed, the overwhelming authority, as discussed earlier, is that a failure properly to disclose rates is no justification for excusing compliance with the tariffs. As the Supreme Court established in an early case:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travellers are charged with notice of it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been

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[3] See 49 C.F.R. § 1305.0 *et seq.* (1980).

[4] On the record presently before me, it is not clear whether Conrail complied with the regulations that require posting of tariffs at stations and freight offices. See 49 C.F.R. § 1305.1.

adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville and Nashville Railroad Company v. *Maxwell*, *supra*, 237 U.S. at 97.

Defendant also argues that it should be excused from payment because Conrail did not comply with federal regulations governing the extension of credit. In particular, Containair claims that the railroad violated one regulation by billing for the detention charges long after these services were rendered. *See* 49 C.F.R. § 1320.10 (1980).[5] As a threshold matter, this regulation does not even appear to apply to detention and storage charges. Its text refers to "freight bills for all *transportation* charges" (emphasis added) which are to be presented after "forwarding of prepaid shipment or delivery of collect shipments . . ." This regulation thus appears to apply to the charges levied for the transportation of freight, not to detention and storage charges, which appear to be governed by 49 C.F.R. § 1320.5 (1980). But

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[5] Text of 49 C.F.R. § 1320.10 (1980):

§ 1320.10 Presentation of freight bills.

Every carrier shall present freight bills for all transportation charges except those specifically excepted in this part to shippers prior to the first 12 o'clock midnight following forwarding of prepaid shipments or delivery of collect shipments except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the billing point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available at the billing point of the carrier. A carrier shall not extend further credit to any shipper which fails to furnish sufficient information to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier. As used in this section the term "shipper" includes, but is not limited to, freight forwarders as well as shippers' associations and shippers' agents within the meaning of section 402(c) of part IV of the Interstate Commerce Act.

even assuming, *arguendo*, that the timing provisions of § 1320.10 apply to storage and detention charges, nothing in the regulation permits the cancellation of charges payable in accordance with legal tariffs as a sanction for untimely billing.[6] The regulation, along with others in the same subpart, implement the congressional purpose of preventing rate discrimination in the form of differential credit arrangements. They provide no basis for imposing the extraordinary relief of excusing compliance with applicable tariffs.

IV.

Conclusion

In sum, the tariffs govern. Conrail is entitled to recover the storage and detention charges due to it. Judgment is to be entered for the plaintiff for $15,152.60.

SO ORDERED.

/s/ Vincent L. Broderick
VINCENT L. BRODERICK
U.S.D.J.

Dated: New York, New York
August 31, 1981

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[6] Moreover, there is no evidence before me that Conrail actually failed to comply with the timing provisions of § 1320.5. The regulation provides that the freight bill must be presented the day after the necessary information becomes available to the billing point of the carrier. In this action, the only evidence concerning the amount of time intervening between the appearance of the necessary information at the billing point and the presentation of the bill is contained in the affidavit of Robert McGlinchey who asserts that once information reached the billing point, "bills are processed in a timely fashion." To raise a question of fact with respect to this issue, defendant was obligated to come forward with opposing evidence or to request discovery. Rule 56(e), Fed.R. Civ.P.

Joint Appendix

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Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

v.

COMMERCIAL METALS CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

JAMES H. PIPKIN, JR.
STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
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(202) 862-2214
Counsel for Petitioner

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COMMERCIAL METALS COMPANY
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(214) 631-4120
Counsel for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1981.
CERTIORARI GRANTED NOVEMBER 16, 1981.

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DOCKET ENTRIES

United States District Court for the
Northern District of Texas:

4-8-77	Filed Complaint and issued Summons
4-12-77	Filed Marshals Return on Summons executed 4-11-77 by serving Charles Merritt by delivery to David Sudbury
4-29-77	Filed Defendant's Motion for Enlargement of Time
5-23-77	Filed Defendant's Original Answer
5-23-77	Filed Order on Defendant's Motion that the time in which Defendant shall respond to Plaintiff's original petition in the above matter is hereby expanded to and including Monday, May 23, 1977
5-26-77	Copies to attorneys of record
6-13-77	Filed Plaintiff's Motion to Strike
6-13-77	Filed Plaintiff's Memorandum in Support of Motion to Strike
1-9-78	Filed Plaintiff's Request for Admissions with Attachments
1-9-78	Order setting case on Monday-Jury Docket, May 15, 1978 to Attorneys January 12, 1978 RWP.
2-8-78	Filed Defendant's Responses to Request for Admissions
3-15-78	Filed Plaintiff's Notice of Deposition of Commercial Metals Company on March 23, 1978, at 1:30 P.M. in Dallas, Texas
4-14-78	Filed Order modifying trial setting and attendant deadlines as follows: motions by plaintiff to be filed on or before April 28, 1978; responses to plaintiff's motions shall be filed on or before May 15, 1978; trial shall be set on the non-jury docket for June 19, 1978; any discovery necessary for trial preparations may be had up and through June 16, 1978; copies mailed to counsel

4-27-81	Filed Plaintiff's Motion for Summary Judgment, with attached Affidavit in support of Plaintiff's Motion for Summary Judgment
4-27-78	Filed Memorandum in Support of Plaintiff's Motion for Summary Judgment
5-17-78	Filed Defendant's Response to Plaintiff's Motion for Summary Judgment
5-17-78	Filed Affidavit in Support of Defendant's Motion and Opposition to Plaintiff's Motion for Summary Judgment, with attached exhibit
5-17-78	Filed Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment
5-17-78	Filed Deposition of George M. Hillman
5-22-78	Filed Plaintiff's Memorandum in Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment
6-8-78	Filed Defendant's Notice of Deposition of Southern Pacific Transportation Company on June 14, 1978, in Dallas, Texas, at 2:00 P.M., with attached exhibit
7-20-78	Filed Deposition of George W. Kruger
12-4-78	Filed Stipulation of Facts
12-19-78	Filed Letter Brief by Michael R. Johnson dated December 5, 1978
1-25-79	Filed Letter Memorandum by Michael R. Johnson dated January 24, 1979
2-26-79	Filed Memorandum Opinion copies mailed to counsel
2-26-79	Filed Judgment that plaintiff shall take nothing in this case; each party shall bear its own costs; copies mailed to counsel
3-26-79	Filed Plaintiff's Notice of Appeal by Southern Pacific Transportation Company from Judgment entered February 26, 1979

3-26-79	Mailed copy of Notice of Appeal to 5th Circuit Court of Appeals together with docket entries. Copy of notice to Judge and to Court Reporter
3-26-79	Filed Plaintiff's Cost Bond on Appeal $250.00
4-27-79	Mailed original case papers to 5th Circuit Court of Appeals (1 volume—2 depositions)
7-1-81	Filed Certified Copy of Judgment from 5th Circuit Court of Appeals issued as and for the mandate . . . It is now here ordered and adjudged by this court that the Judgment of the said District Court in this cause be, and the same is hereby Affirmed. It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.
7-1-81	Filed certified copy of Opinion from 5th Circuit Court of Appeals
7-1-81	Received copy of Bill of Costs from 5th Circuit Court of Appeals
7-20-81	Received Original Case papers from 5th Circuit Court of Appeals (one volume and two depositions)

United States Court of Appeals
for the Fifth Circuit:

4-9-79	Appeal docketed; appearance entered for appellant
4-19-79	Appearance entered for appellee
5-1-79	Record on appeal received; briefing notice issued
6-11-79	Brief for appellant, record excerpts filed
7-9-79	Brief for appellee filed
7-23-79	Reply brief for appellant filed
4-29-80	Supplemental authority filed by appellee
6-12-80	Oral argument
3-30-81	Opinion rendered by panel
4-13-81	Petition for rehearing en banc filed by appellant

6-29-81	Rehearing en banc denied; judgment as mandate issued
7-7-81	Petition for rehearing by panel and motion for leave to file petition for panel rehearing out of time and to recall mandate, filed by appellant
7-21-81	Order granting motion of appellant for leave to file petition for panel rehearing out of time and denying petition for panel rehearing. Further denying appellant's request for recall and stay of the mandate pending petition for certiorari

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-77-0467

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff,

vs.

COMMERCIAL METALS COMPANY,
Defendant.

[Filed Apr. 8, 1977]

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW SOUTHERN PACIFIC TRANSPORTATION COMPANY, hereinafter referred to as Plaintiff, complaining of COMMERCIAL METALS COMPANY, hereinafter referred to as Defendant, and for cause of action would respectfully show unto the Court the following:

I.

Plaintiff, SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation with its principal place of business in San Francisco, California, duly authorized to transact business in the State of Texas, is a common carrier by railroad subject to the provisions of Part I of the Interstate Commerce Act, as amended, as an initial, connecting and delivering carrier of goods and freight in interstate commerce at points along the lines of railroad over which it operates and was so operating as a common carrier by railroad in interstate commerce at all pertinent times hereto.

II.

Defendant, COMMERCIAL METALS COMPANY, a Delaware corporation with its principal place of business

in Dallas, Texas, may be served with summons by serving its President, Charles W. Merritt, 3000 Diamond Park Drive, Dallas, Texas 75247, or its registered agent, Jacob Feldman, also at 3000 Diamond Park Drive, Dallas, Texas 75247.

III.

Jurisdiction is vested in this Court by way of 28 U.S.C. Section 1337, in that Plaintiff's cause of action is based upon charges for freight which are due and owing by Defendant to Plaintiff under the provisions of the Interstate Commerce Act, specifically, 49 U.S.C. Section 6. By virtue of the Interstate Commerce Act, 49 U.S.C. Sections 2, 3(1) and 6(7), Plaintiff is required to collect such freight charges from Defendant.

IV.

Defendant was the consignor of three shipments of freight which originated on April 11, 1974 and May 2, 1974. At or about said dates, Defendant tendered to Plaintiff in Detroit, Michigan certain quantities of steel for transportation over the lines of Plaintiff and its connecting carriers for delivery at Alhambra, California, which shipments were thereupon duly and promptly made to Carco Steel Corporation, the consignee designated by Defendant in the bill of lading covering each such shipment.

V.

Plaintiff is required to collect freight charges for said shipments which, pursuant to the then applicable rates under the duly published and governing tariffs on file with the Interstate Commerce Commission, total $13,679.56.

VI.

Plaintiff, unsuccessful in its attempts to collect said freight charges from Defendant's consignee, assessed said charges against Defendant. Plaintiff would show that there is a balance due and owing by Defendant on such

freight charges in the aggregate amount of $13,679.56, and although often requested to do so, Defendant has failed and refused, and presently fails and refuses to pay Plaintiff such charges or any part thereof, to Plaintiff's damage in said amount. There is attached hereto and incorporated herein for all purposes, a schedule marked Exhibit "A" which shows the date of each shipment about which Plaintiff herein complains, the way bill number, the freight car designation and the amount due Plaintiff as unpaid freight charges for each such shipment.

VII.

Plaintiff is entitled to recover from Defendant interest at the legal rate on the unpaid amount from and after the date of each such shipment referred to in Exhibit "A" attached hereto.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, SOUTHERN PACIFIC TRANSPORTATION COMPANY, respectfully prays that on final hearing hereof Plaintiff recover of and from Defendant, COMMERCIAL METALS COMPANY, the sum of $13,679.56, prejudgement interest, and all costs of Court and such other and further relief, bother [sic] general and special, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

WORSHAM, FORSYTHE & SAMPELS

By /s/ Michael R. Johnson
MICHAEL R. JOHNSON
Suite 2500—2001 Bryan Tower
Dallas, Texas 75201
214/748-9365

Attorneys for Plaintiff

UNCOLLECTED FREIGHT CHARGES

DEBTOR CARCO STEEL CORPORATION

From	To	WayBill No.	WayBill Date	Car Int. No.	Commodity	Weight	Tariff Charges	Freight Bill No.	Amount Collected	Balance Due
Detroit, Mich.	Alhambra, Cal.	152364	5/2/74	EL 44588	Steel	169002	5761.79	581511	-0-	5761.79
Detroit, Mich.	Alhambra, Cal.	152363	5/2/74	PC 545844	Steel	96315	3283.66	581852	-0-	3283.66
Detroit, Mich.	Alhambra, Cal.	155119	4/11/74	EJE 81049	Steel	136190	4634.11	563707	-0-	4634.11
										13679.56

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff,

vs.

COMMERCIAL METALS COMPANY,
Defendant.

DEFENDANT'S ORIGINAL ANSWER

Comes now Commercial Metals Company, Defendant in the above captioned cause, and in answer to Plaintiff's Original Petition would respectfully show the following:

I.

Defendant does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I. of Plaintiff's Original Petition.

II.

Defendant admits the allegations of paragraph II. of the petition.

III.

Defendant admits that Plaintiff purports to vest this court with jurisdiction in this matter pursuant to 28 U.S.C. Section 1337 and 49 U.S.C. Sections 2, 3(1) and 6(7), as set out in paragraph III. of Plaintiff's Original Petition; but Defendant denies that the charges for freight referred to in paragraph III. are due and owing by Defendant to Plaintiff or that Plaintiff is required to collect such freight charges from this Defendant.

IV.

Defendant admits that in the course of business it periodically ships freight but Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the statements that Defendant was the "consignor" of three shipments of freight which originated on April 11, 1974, and May 2, 1974. Defendant denies that at or about said dates it tendered to Plaintiff in Detroit, Michigan, certain quantities of steel for transportation. Defendant is without knowledge or information sufficient to form a belief as to whether any shipments were ultimately delivered to Carco Steel Corporation.

V.

Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the statements contained in paragraph V. but Defendant specifically denies that it is indebted to Plaintiff in the amount of $13,679.56.

VI.

This Defendant is without knowledge or information sufficient to form a belief as to the extent of the attempts of Plaintiff or the degree of success of Plaintiff in attempting to collect said freight charges. Defendant specifically denies that there is a balance due and owing to Plaintiff in the amount of $13,679.56. Defendant further specifically denies that it has been often requested to make such payment and states that the first notice of such claim on the part of the Plaintiff was made by letter received late in the month of December, 1976, or more than two years and eight months since the alleged shipment. Defendant admits that it has failed to pay Plaintiff for such charges or any part thereof. Defendant admits that Exhibit A was attached to the Original Petition but denies that that document shows any amounts due Plaintiff from this Defendant and this Defendant is without knowledge or information sufficient to form a belief as to the document

insofar as it purports to show the way bill number or freight car destination.

VII.

Defendant denies that Plaintiff is entitled to recover interest on the unpaid amount from the alleged date of shipment.

VIII.

Defendant denies that Plaintiff is entitled to any of the relief sought in the last paragraph of Plaintiff's complaint.

FIRST AFFIRMATIVE DEFENSE

IX.

By way of affirmative defense, this Defendant would show that the claim for relief of Plaintiff is barred by the applicable Statute of Limitations and/or by the Doctrine of Laches in that Plaintiff alleges that the shipments in question took place in April and May of 1974 and Plaintiff failed to notify this Defendant of any purported claim until December of 1976 and failed to commence this action until April 8, 1977. As a result of Plaintiff's inaction in notifying this Defendant of the existence of a possible claim, this Defendant has been prejudiced in that it is presently unable to determine whether or not the alleged party to whom the materials were shipped is presently still in business or the whereabouts of such business if it is still being conducted. As a result of Plaintiff's inaction in notifying Defendant of the existence of the claim, this Defendant is unable to ascertain the whereabouts of the alleged receiver of the material in order to determine if the recipient of the material is subject to the jurisdiction of this court as to both service of process and venue and could be made a party without depriving this court of jurisdiction so as to require mandatory or permissive joinder of the recipient of the material or a possible third party complaint against the recipient of the material on the part of this Defendant. This Defendant would further

state that on information and belief the Plaintiff received payment but the checks for such payment were returned by the bank and Plaintiff's inaction in attempting to secure payment or collection of these checks has prejudiced this Defendant's ability to possibly recover said sums from the recipient of the goods as a third party Defendant.

X.

For further answer, should same be necessary, Defendant states that Plaintiff herein has failed to perform all conditions precedent to bringing this action against Defendant in that Plaintiff has failed to use reasonable and appropriate efforts to collect the sums allegedly due for freight charges from the recipient of the materials in that although Plaintiff has known for well over two years that such alleged freight charges have remained unpaid, Plaintiff has failed to use appropriate legal means to collect such charges but instead has by Plaintiff's inaction against the recipient of the materials prejudiced this Defendant's possible ability to recover any sums for which it may be found to be obligated from the recipient of the materials.

WHEREFORE PREMISES CONSIDERED, Defendant prays that upon final trial and hearing hereof judgment be entered that all relief prayed for by Plaintiff in the action be denied and that Defendant have such other and further relief, general and specific, legal and equitable, to which it may show itself justly entitled.

Respectfully submitted,

/s/ David M. Sudbury
DAVID M. SUDBURY
Attorney at Law
P. O. Box 1046
Dallas, Texas 75221
214/631-4120

CERTIFICATE OF SERVICE

I certify that on this —— day of May, 1977, a true and correct copy of the foregoing, Defendant's Original Answer, was served upon counsel for Plaintiff, Mr. Michael R. Johnson, Suite 2500, 2001 Bryan Tower, Dallas, Texas 75201, by placing same in the United States mail, postage prepaid.

/s/ David M. Sudbury
DAVID M. SUDBURY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff,

vs.

COMMERCIAL METALS COMPANY,
Defendant.

STIPULATION OF FACTS

TO THE HONORABLE JUDGE OF SAID COURT:

For any and all purposes in connection with the foregoing Civil Action No. CA-3-77-0467-F, Plaintiff, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and Defendant, COMMERCIAL METALS COMPANY, admit and stipulate to the following Facts:

1. That Plaintiff, Southern Pacific Transportation Company ("Southern Pacific"), a Delaware corporation with its principal place of business in San Francisco, California is a common carrier by railroad subject to the provisions of Part I of the Interstate Commerce Act, as amended, as an initial, connecting and delivering carrier of goods and freight in interstate commerce at points along the lines of railroad over which it operates and was so operating as a common carrier by railroad in interstate commerce at all times pertinent to this action.

2. That Defendant, Commercial Metals Company ("Commercial Metals"), is a Delaware corporation with its principal place of business in Dallas, Texas.

3. That this Court has in personam jurisdiction over the parties.

4. That by virtue of 28 U.S.C. Section 1337, this Court has subject matter jurisdiction since Plaintiff's action seeks to recover freight charges due and owing which the Southern Pacific alleges it is required to collect pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C. Sections 2, 3(1) and 6(7).

5. That Defendant is liable for the debts incurred by or through its Detroit, Michigan office.

6. The three bills of lading involved herein, Waybills Nos. 115119, 152363 and 152364, which are contained in Hillman deposition Exhibits 1, 2 and 3 on file herein, are in evidence for all purposes.

7. Commercial Metals Company did not execute the Section 7 non-recourse provision contained in any of the three bills of lading, Waybills Nos. 115119, 152363 and 152364, involved in the shipments for which freight charges are sought.

8. That the amount of freight charges sought by Plaintiff, $13,679.56 (comprised of the freight charges described in e.g. items #18 and #24, *infra*) is correct and in accord with the then applicable rates under the duly published and governing tariffs on file with the Interstate Commerce Commission at all pertinent times.

9. That in regard to the freight charges sought by Plaintiff herein, Plaintiff has paid, by interline settlements, the initial carrier, the Penn Central Transportation Company, and the connecting carrier, St. Louis Southwestern Railway Company, the proportionate shares of such freight charges earned by each.

10. The three cars involved were delivered to the designated consignee, Carco Steel Corporation ("Carco"), in Alhambra, California. The three cars were the only cars ever delivered to Carco by the Plaintiff.

11. Carco was not a credit patron of Plaintiff; Carco had never applied to Plaintiff for credit; Plaintiff had never investigated the creditworthiness of Carco.

12. Neither Defendant nor anyone else has paid any of the freight charges wought [sic] herein by Plaintiff.

13. Plaintiff received and deposited two checks from Carco, consignee, in the amounts of $2,383.67 and $5,761.79 as payment for the freight charges on the last two of the three cars shipped to consignee Carco. The two checks were not paid but were returned to Plaintiff because of insufficient funds in Carco's account.

CHRONOLOGY OF EVENTS

14. April 11, 1974—Tender of the first railcar of 136,190 pounds of steel cobble by the Detroit office of Commercial Metals to the Penn Central Transportation Company ("Penn Central") for shipment to the designated consignee, Carco in Alhambra, California, Waybill #155119 and Car EJE 81049. (Part of Hillman Exhibit #1).

15. April 23, 1974—Car EJE 81049 was received in the destination rail yard of Plaintiff.

16. April 25, 1974—Car EJE 81049 delivered to Carco at 6:00 a.m. and was released to Plaintiff April 26, 1974, at 5:00 p.m.

17. Car EJE 81049 was delivered by Plaintiff to Carco without the freight charge being collected.

18. April 25, 1974—Freight bill 563707 in the amount of $4,634.11, for freight charges incurred in connection with car EJE 81049, was issued by Plaintiff and mailed to Carco.

19. May 2, 1974—Tender of the last two railcars of steel cobble weighing 169,002 pounds and 96,315 pounds by the Detroit, Michigan office of Commercial Metals to the Penn Central for shipment to the designated consignee, Carco. Waybills #152363 and #152364 (parts of Hillman Exhibits #2 and #3), Cars EL 44588 and PC 545844.

20. May 14, 1974—Cars EL 44588 and PC 545844 were received in the destination rail yard of Plaintiff.

21. May 16, 1974—Plaintiff received and deposited two checks from Carco, #2120 and #2121, dated May 14, 1974, for $2,383.67 and $5,761.79, which were given to Plaintiff in payment for the release of Cars EL 44588 and PC 545844.

22. May 16, 1974—Cars EL 44588 and PC 545844 were delivered to Carco at 6:00 a.m. and released to Plaintiff at 5:00 p.m. the same date.

23. Sometime between May 20, 1974 and May 28, 1974, Plaintiff was advised by Carco's bank that the two checks received (see Item #21, *supra*) would not be honored.

24. May 20, 1974—Freight bill #581511 in the amount of $5,761.79 and freight bill #581852 in the amount of $3,283.66 were issued to Carco by Plaintiff.

25. May 28, 1974 through June 6, 1974—Plaintiff communicated with the Penn Central in Detroit concerning Carco's claim that one of the shipments of steel was to have been made freight prepaid.

26. June 20, 1974—Footnote to telegram from G.W. Kruger, a credit representative in Plaintiff's treasury department to various persons in Plaintiff's organization, indicating that the owner of Carco had been avoiding the railroad's accounting department representative who was attempting to have the checks from Carco redeposited.

27. June 27, 1974—Plaintiff's documents concerning the freight charges and related matters were forwarded from the Los Angeles Zone Office to its legal department in San Francisco for collection.

28. August 5, 1974—Letter from Walt A. Steiger, attorney for Southern Pacific, to Carco requesting payment of freight charges in the amount of $13,679.56.

29. August 23, 1974—Complaint and Summons in action styled *Southern Pacific Transportation Company v. Carco Steel Corporation*, et al, #C98004 filed by Plaintiff in Superior Court of California, Los Angeles County.

30. August 29, 1974—Letter from Walt A. Steiger, to J.E. Cole, special agent for Plaintiff, requesting that he serve the Summons and Complaint upon Carco.

31. October 7, 1974—Letter from Carl Fidler, president of Carco, to Walt A. Steiger, stating that the steel was received by Carco in damaged condition.

32. October 16, 1974—Letter from Walter A. Steiger to Carl Fidler responding to the latter's letter of October 7, 1974. Steiger stated therein that he could not determine who at Southern Pacific Fidler had contacted regarding damage claim; that if the lading was damaged, Fidler should file a claim in writing with Plaintiff's freight claim agent.

33. October 17, 1974—Letter from Walter C. Kutscher of Carco to Steiger in response to the latter's letter of October 16, 1974. Kutscher suggests that a written claim regarding freight damage was sent to Plaintiff. He further states that Carco would not cooperate further in light of Plaintiff's pending lawsuit against Carco.

34. October 21, 1974—Letter from M. W. Copeland, Assistant Freight Claim Agent of Plaintiff, to William E. Still (in Steiger's office) indicating that no freight damage claims had been received from Carco and that there was no record of Carco requesting that Plaintiff inspect the three cars involved.

35. October 23, 1974—Letter from Steiger to Kutscher advising him of the information received from the freight department (see #33, *supra*).

36. February 26, 1975—Letter from J. J. Cavanaugh, investigator in the office of J. E. Cole, to C. W. Champlin (in Steiger's office). Cavanaugh stated therein that, upon

receipt of the file from Cole per letter of August 29, 1974, he had attempted to serve Carl Fidler, president of Carco, with the Summons and Complaint. He stated further that he called on Carco's place of business at all hours of the day and on each occasion was told that Fidler was out of town or somewhere else out of the office and that the receptionist had no idea when he would return. Cavanaugh concluded that Fidler was making every effort to avoid service and that it would be necessary to employ another method of service.

37. March 17, 1975—Request from Steiger's office to Los Angeles County sheriff requesting service of Summons and Complaint upon Carco.

38. April 21, 1975—Report from Los Angeles County sheriff indicating inability to effect personal service upon Carco.

39. April 25, 1975—Letter from Steiger to California Secretary of State concerning Carco, whether it was a California corporation, its designated agent for service, etc.

40. May 2, 1975—Response from Secretary of State of California to Steiger's April 25, 1975 letter. Indicated that Carco was a California corporation, with its principal office in Los Angeles County and that it did not have a registered agent for services of process.

41. December 17, 1976—Letter from J. M. Corbet, acting manager of Plaintiff's Los Angeles zone office, to Defendant requesting payment of the freight charges in the amount of $13,679.56 as a result of Plaintiff's inability to collect the freight charges from Carco together with Defendant's failure to execute the Section 7 nonrecourse provisions in the bills of lading. Copies of the three freight bills were enclosed. This was the first notice to Defendant that the freight had not been collected from Carco.

42. January 21, 1977—Letter from J. C. Corbet to Defendant enclosing letter (with enclosures) of December 17, 1976, and repeating request that Defendant pay the uncollected freight charges.

43. March 11, 1977—Letter from Steiger to Kraut & Schneider, Inc. in Los Angeles, private investigators, requesting that they undertake to serve the Summons and Complaint (in the action described in item #29, *supra*).

44. April 8, 1977—*Southern Pacific Transportation Co. v. Commercial Metals Co.*, CA3770467F filed in the U.S. District Court, N.D. Tex., Dallas Division.

45. April 27, 1977—Letter from Kraut & Schneider, Inc. to Plaintiff with report of their unsuccessful efforts to effect service of Summons and Complaint, together with their bill in the amount of $486.60.

Respectfully submitted,

WORSHAM, FORSYTHE & SAMPLES

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION CO.

vs.

COMMERCIAL METALS CO.

MEMORANDUM OPINION

This case is submitted to the Court on stipulated facts, and a copy of the stipulated facts is attached to this memorandum opinion. Plaintiff Southern Pacific Transportation Co. seeks to recover from defendant Commercial Metals certain freight charges which were not paid by the designated consignee (Carco Steel Corporation) of certain shipments of steel cobble. The freight charges amount to $13,679.56. Plaintiff first attempted to recover the freight charges from the consignee Carco. Unable to do so, it then turned to defendant, as consignor, to recover such charges.

Defendant alleges that recovery of the freight charges from Commercial Metals Co. is barred by the doctrine of laches and estoppel. Defendant notes that for a period of over 31 months after delivery, the defendant was not notified of any problem whatsoever by the Penn Central Transportation Co. or the plaintiff in regard to collection of the freight charges. Defendant also notes that Carco, the consignor, was not a credit patron of Southern Pacific Railroad, had never applied for credit to that railroad, and that railroad had never investigated the credit worthiness of Carco. Disregarding the requirement that the railroad not release the shipment until the tariff rate had been collected [49 U.S.C. § 3(2)] the railroad released the first car of steel cobble to Carco without col-

lecting any charge. The last two rail cars were released to Carco at a time when the railroad's freight bill to Carco was still outstanding, unpaid, and past due. Despite the unpaid freight charge on the first car, the railroad accepted a partial payment of the charges on the last two cars and released those cars on May 16, 1974. Defendant argues that this manner of releasing the shipments to the care of Carco is not in compliance with 49 U.S.C. § 3(2) and § 1320.1 of the regulations promulgated under the Act by the ICC and found at 49 C.F.R. § 1320-1329. Defendant also argues that it entered into a shipping contract with the Penn Central Transportation Co., and Southern Pacific was only a connecting shipper. Defendant argues that plaintiff has failed to show what right or authority it has to sue on a contract to which it was not a party.

Plaintiff may maintain this action against Commercial Metals. The allegations in this case are comparable to those considered by the Court in *Pennsylvania Railroad Co. v. Green*, 173 F.Supp. 657 (S.D. Ala. 1959). In that case the plaintiff railroad company sought to recover freight charges from the defendant. The defendant contended that the action could not be maintained by the plaintiff, the terminal carrier, because no privity of contract existed since the original agreement was entered into between the defendant and the initial carrier, the Louisville and Nashville Railroad. The Court rejected defendant's claim, holding that the plaintiff, as the final carrier of the freight, was entitled to collect the freight charges from [sic] its proceeding carriers.

Plaintiff has established a prima facie case for the recovery of the freight charges from defendant. Plaintiff is a common carrier which delivered three carloads of steel to the designated consignee. The charges sought from defendant by plaintiff are correct and in accord with applicable tariffs and none of the freight charges have been recovered by plaintiff from defendant or anyone

else. Plaintiff attempted to collect the charges from Carco, and failed to do so. Absent a showing of valid and affirmative defenses, defendant is liable to plaintiff for the freight charges.

I reject the defendant's claim that plaintiff's delay in seeking to recover from the defendant bars the plaintiff's recovery in this case. Although defendant had no notice that the freight charges had not been paid until a letter dated December 17, 1976, nearly two and one-half years after the delivery of the shipments in 1974, the applicable statute of limitations is three years and during the two and one-half year period plaintiff had been making efforts to locate Carco and receive payment from Carco. *See St. Louis & San Francisco Ry. Co. v. Miller Floors, Inc.*, 293 F.Supp. 869, 871, (W.D. Okla. 1968).

The Court reaches a different conclusion, however, in considering defendant's argument regarding the plaintiff's failure to comply with the regulations promulgated by the ICC. Section 1320.1 of the regulations promulgated under the Act by the ICC and found at 49 C.F.R. § 1320-1329 authorizes the carrier to relinquish possession of freight "upon taking precautions deemed by it to be sufficient to insure payment of the tariff charges within the credit period specified in this part. . ." Railroads are required to collect freight charges within a period of four or five days. A review of the stipulated facts makes it clear that the plaintiff ignored these rules and granted preferential credit terms to Carco. The railroad's actions in releasing the last two cars on May 16 while apparently ignoring the outstanding freight bill for the first car and accepting less than full payment by means of a check backed by insufficient funds from a consignee whose credit worthiness the railroad had never ever investigated bar plaintiff's recovery of the freight charges in this action. Defendant has established a valid, equitable, defense to the collection of the freight charges.

Plaintiff argues that defendant failed to avail itself of the contractual opportunity to relieve itself of liability for the freight charges sought in this case by failing to execute the Section 7 "non-recourse" provision contained in each of the three bills of lading involved herein. If the non-recourse clause is not signed by the consignor, the consignor remains liable to the carrier for all lawful charges. *Illinois Steel Co. v. Baltimore & Ohio Ry. Co.*, 320 U.S. 508, 513 (1944). While it is true that the defendant did not sign the "non-recourse" provision, defendant does not need the benefit of the "non-recourse" provision to establish its equitable defense.

In *East Texas Motor Freight Lines vs. Franklin County Distilling Co.*, 184 S.W. 2d 505, 507 (Tex. Civ. App. — — El Paso 1944, no writ) the Court held that:

> The consignor of freight under a bill of lading, such as is here in question, failing to sign the non-recourse provision, is liable for the legitimate freight charges on this shipment. This is true even though the carrier makes delivery in violation of Section 323 of Tile 29, U.S.C.C., [sic] and violates the rules of the Commission as to extending credit to the consignee, or fails to show that it complied with the rules of the Commission relative to the extension of credit to the consignee.

I disagree with the conclusion reached by the Court in *East Texas Motor Freight Lines.* The loss sustained by the plaintiff was due entirely to its own fault and negligence by failing to take the proper credit precautions when it delivered the goods to Carco. The precautions taken by the plaintiff were not sufficient to insure payment of the tariff charges within the credit period; in fact, no precautions were taken. While other courts may disagree, I think that it is fundamentally unfair and inequitable for the defendant in this case to pay for the gross negligence of the plaintiff.

Plaintiff shall take nothing in its suit against Commercial Metals Co., and I will enter judgment for the defendant.

It is so ORDERED.

/s/ Robert W. Porter
United States District Judge

DATE: February 26, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION CO.

vs.

COMMERICAL METALS CO.

JUDGMENT

It is hereby ORDERED that the plaintiff shall take nothing in this case. Each party shall bear its own costs.

It is so ORDERED.

/s/ Robert W. Porter
United States District Judge

DATE: February 26, 1979

[OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-1843

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant,
v.
COMMERCIAL METALS COMPANY,
Defendant-Appellee.

March 30, 1981

Appeal from the United States District Court
for the Northern District of Texas

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

TJOFLAT, Circuit Judge:

The sole question presented by this appeal is whether the failure of a carrier to comply with credit regulations promulgated under the Interstate Commerce Act is a defense available to a consignor in an action by the carrier against a consignor who failed to execute a nonrecourse provision in the relevant bill of lading. The district court found the carrier's failure to be a valid defense; we affirm.

I

The facts in this case are not in dispute. On April 11, 1974, Commercial Metals Co. (Commercial) tendered one railcar of steel cobble to Penn Central Transportation Company for shipment to the designated consignee,

Carco Steel Corporation (Carco). When arranging for shipment, Commercial did not execute the nonrecourse provision in the applicable bill of lading. This railcar was delivered by Southern Pacific Transportation, the last in a succession of carriers, to Carco on April 25, 1974. The railcar was released to Carco without collection of the shipping charges. Prior to delivery Southern Pacific did not investigate Carco's credit worthiness.

On May 2, 1974, Commercial tendered two more railcars of steel cobble to Penn Central for shipment to Carco as consignee. When arranging for shipment, Commercial once again failed to execute the nonrecourse provision in the bills of lading. Soon thereafter, Southern Pacific Transportation delivered these railcars to Carco. At the time of their delivery, Carco had still not paid the freight charges on the first railcar of steel. Nevertheless, on May 16, 1974, Southern Pacific released these two railcars to Carco on receipt of two checks. The total amount tendered to Southern Pacific at that time was approximately $900 short of the sum actually due for shipping the last two cars; Carco made no offer to pay the sum due for shipment of the first railcar. The checks Carco tendered were dishonored by Carco's bank.

Southern Pacific subsequently attempted to recover all sums due it from Carco, but was unable to do so. Two years and seven months later, Southern Pacific made demand on Commercial for payment of the shipping charges. Commercial refused to pay, and Southern Pacific commenced this action in the district court.

II

[1] It is clear that "ordinarily the shipper is presumed primarily liable to the carrier for freight charges for the transportation of goods." *O'Boyle Tank Lines, Inc. v. Beckham*, 616 F.2d 207, 209 (5th Cir. 1980). Although this presumption may be modified by contract, *id.*, Commercial's failure to execute the nonrecourse provision of the bill of lading is a clear indication that Com-

mercial was to be primarily liable for the cost of shipping these three railcars. *Illinois Steel Co. v. Baltimore & Ohio Railroad Co.*, 320 U.S. 508, 513, 64 S.Ct. 322, 325, 88 L.Ed. 259 (1944). Moreover, it is undisputed that Southern Pacific did deliver the railcars to Carco and has subsequently instituted this suit against Commercial within the applicable statute of limitations. Thus, in the absence of a valid defense, Commercial must be held liable to Southern Pacific for the freight charges.

[2] Section 3(2) of the Interstate Commerce Act, however, is a barrier to Southern Pacific's collection of the charges. That section reads in pertinent part:

> No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . .

49 U.S.C. § 3(2) (1976). The regulations promulgated under the Act modify this statutory mandate by allowing for delivery of freight on credit. The terms under which credit may be extended, however, are quite strict. The applicable regulation reads:

> The carrier, *upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified* in this part, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 4 days (or 5 days where retention or possession of freight by the carrier until tariff rates and charges thereon

> have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part.

49 C.F.R. § 1320.1 (1979) (emphasis added).

As the facts of this case reveal, and as the parties agree, Southern Pacific failed to comply with section 3(2) of the Act by extending credit to Carco, without adequate precautions, for a period in excess of that provided for in the applicable regulation. The only question, therefore, is whether Southern Pacific's failure in this regard should constitute a defense to Commercial in Southern Pacific's action for the freight charges. The district court held that Southern Pacific's failure was a defense, and we agree.

Consolidated Freightways Corp. of Delaware v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971), presents a closely analogous situation. In that case, Admiral Corporation was consignee on bills of lading executed by a freight forwarder as consignor. This consignor marked the bills of lading "prepaid," which indicated that the carrier was to bill the consignor. After the goods were delivered to Admiral, the carrier billed the consignor for freight charges. The consignor, who had obtained credit from the carrier for a period beyond that allowed by the applicable regulations, failed to tender payment. The carrier then attempted to secure payment from Admiral. The court held that the carrier's "unlawful conduct in violating the [relevant] credit regulations," *id* at 63, precluded the carrier from recovering from Admiral. The court stressed that "[p]ermitting [the carrier to recover] in this case would serve only to reward the carrier for its unlawful as well as inequitable conduct." *Id. Accord, Brown Transportation Corp. v. Atcon, Inc.*, 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014, 99 S.Ct. 626, 58 L.Ed.2d 687

(1978); *Allied Van Lines Inc. v. Hanson*, 131 Ga. App. 506, 206 S.E.2d 108 (1974); *Aero Mayflower Transit Co., Inc. v. Harbin*, 126 Ga. App. 72, 190 S.E.2d 91 (1972); *Checker Van Lines v. Siltek International, Ltd.*, 169 N.J. Super. 102, 404 A.2d 333 (1979).

In the face of this authority, Southern Pacific has offered two reasons why its failure to comply with the ICC credit regulations should not preclude its recovery of freight charges. First, it argues that if the defense is allowed, the freight charges will not be paid, and nonpayment will violate the Interstate Commerce Act's clear prohibition of rate discrimination. Section 6(7) of the Act provides:

> No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

49 U.S.C. § 6(7) (1976). Southern Pacific's argument is that allowing Commercial to avoid paying freight charges will, in effect, extend to Commercial a rate privilege, tantamount to a rate exemption, which clearly violates

the Interstate Commerce Act's prohibition of all rate discrimination. Furthermore, Southern Pacific argues that when a pricing arrangement is discriminatory, the Act allows no defenses in an action designed to rectify that discrimination, regardless of the carrier's conduct.

It is true that the primary purpose of the Interstate Commerce Act was to achieve uniformity in freight transportation charges and therefore to eliminate rate discrimination. *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978). As the Supreme Court has stated, the purpose of the Act was to achieve "but one rate, open to all alike, and from which there could be no departure." *Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 112, 34 S.Ct. 526, 528, 58 L.Ed. 868 (1914). *See also Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919). It is also true that, in light of this Congressional intent, courts have been quite reluctant to allow defenses to a carrier's claim for freight charges. *See Illinois Central Gulf Railroad, Co.*, 586 F.2d at 592. Thus, for example, when a carrier negligently undercharged a shipper of goods and then, upon discovering the error, sought to recover the balance, the Supreme Court refused to allow the shipper to use the carrier's initial failure to charge the proper rate as a defense. *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., supra.*

It is not appropriate, however, to rely on section 6 (7) of the Act and cases such as *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., supra*, to justify an absolute prohibition of defenses to a carrier's action against a shipper for freight charges. In each case the court must consider whether, under the circumstances presented, allowing the defense would undermine the purpose of the Interstate Commerce Act. The proper inquiry, then, is whether our recognition of the defense offered by Commercial in this case "will serve directly or indirectly as a cover for freight rate discrimination."

Chicago, Burlington & Quincy Railroad Co. v. Ready Mixed Concrete Co., 487 F.2d 1263, 1267 (8th Cir. 1973). *See also In re Penn Central Transportation Co.*, 477 F.2d 841, 844 (3d Cir.), *aff'd*, 414 U.S. 885, 94 S.Ct. 231, 38 L.Ed.2d 137 (1973); *Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219, 1222 (8th Cir. 1972).

The facts of this case do not reveal a situation in which denial of recovery to the carrier will serve as a cover for rate discrimination. Commercial was not extended a preferential rate, nor is there any evidence that the company contracted for or otherwise sought such a rate. "The full rate was charged. The only unlawful discrimination was the plaintiff's extension of credit . . . ." *Consolidated Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d at 63. Neither party denies that Southern Pacific could and should have demanded full payment for the freight charges from Carco, and that, initially, Southern Pacific could also have asserted the same claim against Commercial. "So long as payment of the full tariff charges may be demanded from some party, the antidiscrimination policy of the [Act] is satisfied." *Id.* at 62. In the absence of a specifically applicable Congressional mandate, we refuse to transform the Act's anti-discrimination provision into "a sword to insure collection in every instance and a shield to insulate the carrier from the legal consequences of otherwise negligent or inequitable conduct." *Id.* Here, there was no attempt to achieve rate discrimination; the only discrimination that occurred was Southern Pacific's extension of specifically prohibited credit terms to Carco. It would indeed be anomalous to allow Southern Pacific to recover despite its conduct. The integrity of the Act is not eroded by barring Southern Pacific's recovery.

Southern Pacific offers a second argument to void Commercial's defense in this action. It claims that those courts that have allowed defenses to a carrier's action for

freight charges based upon the conduct of the carrier have done so only because the party from whom recovery was sought had already paid the shipping charge, albeit to someone other than the carrier. Thus, the defense asserted by Commercial should only be allowed if Commercial had prepaid Carco for the freight charge. The defense, in other words, should be allowed only to preclude double payment of freight charges.

Southern Pacific is on solid ground when it asserts that the cases Commercial relies on, such as *Admiral Corp., supra*, and the Georgia cases cited Slip op. 5388, at ——, *supra*, are factually distinguishable from the case at bar. In these cases the defending party paid the shipping charge, pursuant to contract, to someone other than the carrier, and the carrier understood, or should have understood this arrangement. Nevertheless, we believe this distinction is one of degree only; assuredly, holding Commercial liable if it had prepaid the freight charges would work an injustice. It does not necessarily follow, however, that holding Commercial liable here absent prepayment would not also be unjust, when its injury is solely the result of the improper and illegal business practices of Southern Pacific. "In this case a carrier seeks to extend the protective policy of the [Interstate Commerce Act] in order to be held harmless from credit losses resulting directly from its own flagrant disregard of regulations promulgated under the statute." *Consolidated Freightways Corp. of Delaware*, 442 F.2d at 65 (Stevens, J., concurring). Under these circumstances, we are compelled to hold that the carrier's failure to comply with the applicable ICC regulations is a defense, available to Commercial, in an action by the carrier for unpaid freight charges.

For these reasons, we affirm the decision of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1843

D.C. Docket No. CA 3-77-0467-F

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellant,
versus

COMMERCIAL METALS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before TJOFLAT, POLITZ AND HATCHETT, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 30, 1981

ISSUED AS MANDATE: June 29, 1981

Uniform Domestic ... Bill of Lading adopted by carriers in Official, Southern, Western and Illinois Classification territories March 15, ... as amended August 1, 1940, ... 15, 1940, September 21, 1948, ... 9, 1948, and July 14, 1949)

P. G. E. 3500
2/71
PRINTED IN U.S.A.

UNIFORM STRAIGHT BILL OF LADING — Original — Not Negotiable

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

622 PENN CENTRAL TRANSPORTATION COMPANY 622

1

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., TRUSTEES

CAR INITIAL ETE CAR NUMBER 81049

LCL/LCM	TY	TRAILER INITIALS	TRAILER NUMBER	LCL/LCM	TY	TRAILER INITIALS	TRAILER NUMBER	LENGTH/CAPACITY OF CAR ORDERED	LENGTH/CAPACITY OF CAR FURNISHED	WEIGHT IN TONS CONSTRUCTION	WEIGHT IN TONS GROSS/TARE	WAYBILL DATE	WAYBILL NO

STOP THIS CAR AT ... FOR ...

CONSIGNEE AND ADDRESS AT STOP

ORIGIN STATE

Detroit, Michigan

SHIPPER FULL NAME OF SHIPPER
COMMERCIAL METALS COMPANY
8650 Mt. Elliott

BILL OF LADING DATE: 4-11-74
BILL OF LADING NO.
NOTICE NO: [redacted] 1460
CUSTOMER NO.

CONSIGNEE AND ADDRESS
CARCO
3201 W. Mission Road
DESTINATION: Alhambra, California
STATE OF
COUNTY OF

ROUTE (FOR SHIPPER'S USE ONLY)
PC - Est - SSW - SP

DELIVERY CARRIER

WHEN SHIPPER IN THE UNITED STATES EXECUTES NO RECOURSE CLAUSE OF SECT. 7 OF BILL OF LADING CHECK (x) → YES ☐

RECEIVED $ TO APPLY AS PREPAYMENT OF CHARGES ON THE PROPERTY DESCRIBED HEREON

AGENT OR CASHIER

PER

THE SIGNATURE HERE ACKNOWLEDGES ONLY THE AMOUNT PREPAID:

CHARGES ADVANCED

$

WEIGHED AT
GROSS
TARE
ALLOWANCE
NET

IF CHARGES ARE TO BE PREPAID WRITE OR STAMP HERE

TO BE PREPAID

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of the freight and all other lawful charges.

Signature of Consignor

Note: Where the rate is dependent upon value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ... per ...

If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

SHIPPER'S SPECIAL INSTRUCTIONS (INCLUDE ICING, VENTILATION, HEATING, MILLING, REICHING, ETC.)

NO. PKGS	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	COMMODITY CODE NO.	* WEIGHT (SUBJECT TO COR.)	RATE	FREIGHT	ADVANCES	PREPAID
	1¼ X 36 3/4 X 20' 10"		3,254#				
	1¼ X 40½ X 20' 7"		3,542#				
	1¼ X 43½ X 20' 9"		3,836#				
	1 3/8" X 31¼ X 20' 9"		3,031#				
	1¼ X 33¼ X 18' 3"		2,579#				
	1 3/8" X 39½" X 22' 2"		4,093#				
	1 3/8" X 39½" X 20' 9"		3,832#				
	1 3/8" X 40" X 20' 0"		3,740#				
	1 3/8" X 39½ X 20' 10"		3,847#				
	1½ X 35½ X 21' 0"		3,802#				
	1½ X 35½ X 20' 10"		3,772#				
	1½ X 35½ X 20' 11½"		3,794#				
	SEE ATTACHED SHEET		136,190#				

RAIL 4-11-74

SHIPPER PER AGENT PER

PERMANENT POST OFFICE ADDRESS OF SHIPPER

39

CONTRACT TERMS AND CONDITIONS

ATTACHMENT FOR BILL-OF-LADING

April 11, 1973

CARCO
3201 W. Mission Road
Alhambra, California

½ X 35⅛ X 20' 8½"	3,723#
1½ X 35⅛ X 20' 9"	3,730#
1½ X 35⅛ X 21' 0"	3,775
1 3/16 X 30 X 23' 6"	2,849#
1 3/8 X 38⅛ X 20'	3,576#
1 3/8 X 38½ X 20' 2"	3,630#
1 3/8 X 30½ X 21' 8"	3,125#
1 3/8 X 30½ X 21' 2"	3,018#
4 7/8 X 44" X 77"	4,678#
5 X 42 X 87"	5,175#
5½ X 43 X 117"	7,838#
6 3/4 X 44 X 68"	5,720#
6 3/4 X 40 X 80"	6,119#
6 3/4 X 44 X 127"	10,686#
9 X 40 3/4 X 103"	5,935#
7 X 44 X 74"	6,457#
7 X 43 3/4 X 81"	7,026#
7 X 36 X 84"	5,998#
	136,190#

THIS MEMORANDUM

622 PENN CENTRAL TRANSPORTATION COMPANY 622 3

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., TRUSTEES

CAR INITIAL: EI CAR NUMBER: 44588

TRAILER INITIALS / NUMBER | TRAILER INITIALS / NUMBER | LENGTH/CAPACITY OF CAR ORDERED / FURNISHED | WEIGHT IN TONS GROSS / TARE | WAYBILL DATE | WAYBILL NO.

STOP THIS CAR FOR CONSIGNEE AND ADDRESS AT STOP

AT FOR

AT FOR

AT FOR

ORIGIN STATE

Detroit, Michigan 48212

SHIPPER FULL NAME OF SHIPPER

COMMERCIAL METALS COMPANY

8650 Mt. Elliott

BILL OF LADING DATE: 5-2-74 | BILL OF LADING NO. | ORDER NO. 1571 | CUSTOMER NO. 8601-CF

CONSIGNEE AND ADDRESS

CARCO

3201 W. Mission Road

DESTINATION: Alhambra, | STATE OF: California | COUNTY OF

ROUTE (FOR SHIPPER'S USE ONLY)

PC to St. Louis - SSW - SP

DELIVERING CARRIER

WHEN SHIPPED IN THE UNITED STATES OR CANADA NO RECOURSE UNLESS DRAFT IS NOT PAID OR BILL OF LADING CHECKED → YES ☐

WE SHIP AT

CAUSE

TIME

RECEIVED TO BE FORWARDED FREIGHT CHARGES ON THE PROPERTY DESCRIBED HEREIN

ALLOWANCE

NET

AGENT OR CASHIER

PER

THE SIGNATURE HERE ACKNOWLEDGES ONLY THE AMOUNT PREPAID

CHARGES ADVANCED $

IF CHARGES ARE TO BE PREPAID WRITE OR STAMP HERE

TO BE PREPAID

SHIPPER'S SPECIAL INSTRUCTIONS (INCLUDE ICING, VENTILATION, HEATING, MILLING, WEIGHING, ETC.)

NO. PKGS	DESCRIPTION OF ARTICLES, SPECIAL COMMODITY MARKS AND EXCEPTIONS	CLASS OR RATE NO.	WEIGHT (SUBJECT TO CORRECTION)	RATE	FREIGHT	ADVANCES	PREPAID
59 pcs.	1" - 4" Cobble 30 - 60 Wide		169,002#				

[illegible] 32

SHIPPER

PERMANENT POST OFFICE ADDRESS OF SHIPPER 8650 Mt. Elliott, Detroit MI

PER AGENT

PER

UNIFORM STRAIGHT BILL OF LADING — Original — Not Negotiable

622 PENN CENTRAL TRANSPORTATION COMPANY 622 1

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., TRUSTEES

CAR INITIAL: PC CAR NUMBER: 545844

TRAILER INITIALS / TRAILER NUMBER / TRAILER LENGTH OR CAPACITY TO BE USED / TRAILER WEIGHT IN TONS / RAILROAD DATE / WAYBILL NO.

STOP THIS CAR FOR / CONSIGNEE AND ADDRESS AT STOP

AT / FOR

AT / FOR

AT

ORIGIN STATE: Detroit, Michigan

SHIPPER: FULL NAME OF SHIPPER: COMMERCIAL METALS COMPANY 8650 Mt. Elliott

BILL OF LADING DATE: 5-2-74 BILL OF LADING NO.: 1572 SHIPPER'S NO.: 8601-2 CF

WHEN SHIPPER IN THE UNITED STATES REQUIRED BY CLAUSE OF SECT. 7 OF B/L OF LADING CHECKED → YES

CONSIGNEE AND ADDRESS: CARCO 3201 W. Mission

DESTINATION: Alhambra, California STATE OF: COUNTY OF:

ROUTE (FOR SHIPPER'S USE ONLY): PC to St. Louis - SSW - SP

DELIVERING CARRIER:

AGENT OR CASHIER PER

THIS SPACE NOT TO BE USED BY SHIPPER

CHARGES ADVANCED $

CHARGES AND TO BE PREPAID WRITE OR STAMP HERE: TO BE PREPAID

SHIPPER'S SPECIAL INSTRUCTIONS (INCLUDE ICING, VENTILATION, HEATING, MILLING, WEIGHING, ETC.):

NO. PKGS	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	CLASS OR RATE	WEIGHT (SUBJECT TO CORRECTION)	RATE	FREIGHT	ADVANCES	PREPAID
16 pcs.	2" - 6" Cobble Various X Various		96,315#				

Received for Freight Only
MAR 19, 74
Shippers Load and count

SHIPPER

PERMANENT POST OFFICE ADDRESS OF SHIPPER

PER AGENT: 8650 Mt. Elliott, Detroit, MI

PER

CONTRACT TERMS AND CONDITIONS

Sec. 6. (a) The carrier or party in possession of any of the property described in the bill of lading hereunder shall be liable for and in respect of loss of and damage to the property, except as hereinafter provided.

(b) No carrier or party in possession of the property shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage, or for any difference in weight between the weight at origin and the weight at destination if the weight at origin is not ascertained by the carrier, or for any loss or damage to the property or any delay caused by the inherent nature of the property, or by riots or strikes, or by stoppage of labor from whatever cause, or by any cause which the carrier could not have prevented by the exercise of due diligence, or for any loss or damage to the property or any delay caused by the defective condition of equipment not readily discoverable by reasonable inspection of such equipment according to the standards of the carrier or standards generally used by carriers of equipment, but the burden shall rest upon the carrier to establish by a preponderance of the evidence that it was not guilty of negligence and that the loss, damage, or delay was due to one or more of the causes specified in this paragraph. The carrier shall not be liable for loss, damage, or delay occurring while the property is stopped in transit on the request of the shipper, owner, or party entitled to make such request, unless the stoppage is required by the carrier's tariffs, or unless the carrier fails to forward the property within forty-eight (48) hours after the shipper, owner, or party entitled to make such request has given the carrier notice that the reason for the stoppage no longer exists.

(c) In case of quarantine the property may be discharged by the carrier at any quarantine station or elsewhere according to law or the regulations of the quarantine authorities, and such discharge shall be a complete fulfillment of the contract as to such property, and the carrier may demand and collect charges as if the property had been carried to destination. During ordinary business hours, [illegible] after arrival of notice of quarantine regulations affecting the property, the carrier shall not be liable for any loss or damage to the property, except as may be caused by its negligence after the expiration of such time. The carrier shall not be liable for any loss or damage to the property or any delay caused by the inherent nature of the property, or by riots or strikes, or by stoppage of labor from whatever cause, or by any cause which the carrier could not have prevented by the exercise of due diligence, or for any loss or damage to the property or any delay caused by the defective condition of equipment not readily discoverable by reasonable inspection of such equipment according to the standards of the carrier or standards generally used by carriers of equipment, but the burden shall rest upon the carrier to establish by a preponderance of the evidence that it was not guilty of negligence and that the loss, damage, or delay was due to one or more of the causes specified in this paragraph. The carrier shall not be liable for loss, damage, or delay occurring while the property is stopped in transit on the request of the shipper, owner, or party entitled to make such request, unless the stoppage is required by the carrier's tariffs, or unless the carrier fails to forward the property within forty-eight (48) hours after the shipper, owner, or party entitled to make such request has given the carrier notice that the reason for the stoppage no longer exists.

(d) The carrier shall not be liable for loss, damage, or delay occurring while the property is stopped in transit on the request of the shipper, owner, or party entitled to make such request, unless the stoppage is required by the carrier's tariffs, or unless the carrier fails to forward the property within forty-eight (48) hours after the shipper, owner, or party entitled to make such request has given the carrier notice that the reason for the stoppage no longer exists.

(e) The carrier shall not be liable for loss, damage, or delay occurring while the property is stopped in transit on the request of the shipper, owner, or party entitled to make such request, unless the stoppage is required by the carrier's tariffs, or unless the carrier fails to forward the property within forty-eight (48) hours after the shipper, owner, or party entitled to make such request has given the carrier notice that the reason for the stoppage no longer exists.

(f) The carrier shall not be liable for loss, damage, or delay occurring while the property is stopped in transit on the request of the shipper, owner, or party entitled to make such request, unless the stoppage is required by the carrier's tariffs, or unless the carrier fails to forward the property within forty-eight (48) hours after the shipper, owner, or party entitled to make such request has given the carrier notice that the reason for the stoppage no longer exists.

Sec. 10. Any provision, condition, or stipulation in this bill of lading or in any tariff or rule thereunder which is inconsistent with the foregoing shall be void, but such invalidity shall not affect the validity of the remainder of this bill of lading.

Effective June 15, 1941

Opposition

Office - Supreme Court, U.S.
FILED
OCT 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN PACIFIC TRANSPORTATION CO.
Petitioner,

v.

COMMERCIAL METALS CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorneys for Respondent

October 27, 1981

Bowne of Dallas
Printed in U.S.A.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals properly hold that Southern Pacific's violations of the Interstate Commerce Act and applicable rules and regulations promulgated by the Interstate Commerce Commission constitute a defense to Southern Pacific's claim?

   a. Does the holding of the Court of Appeals violate the anti-discriminatory provisions of the Interstate Commerce Act?

   b. Is the public interest best served by permitting a railroad to recover a loss resulting from its own action in granting illegal credit preferences?

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The partially owned subsidiaries of Respondent are:

1. Commercial Metals de Mexico S.A. de C.V.
2. Eurintrade, S.A.
3. Pinto Island Metals Company, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-622

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

v.

COMMERCIAL METALS CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondent, Commercial Metals Company, respectfully prays that the Court not issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

OPINIONS BELOW

Petitioner accurately cited the opinion of the Court of Appeals. Respondent accepts, as essentially correct, the reproduction of the opinion of the Court of Appeals and the District Court that appear in the Appendix to petitioner's brief. Except for minor typographical errors, they are correct.

STATEMENT OF THE CASE

Respondent, Commercial Metals Company (hereinafter called "Commercial"), is in the business of buying and selling steel goods. Petitioner, Southern Pacific Transportation

Co. (hereinafter called "Southern Pacific"), is a common carrier by rail (i.e., a railroad company).

Commercial sold steel products to its customer, Carco Steel Corporation (hereinafter called "Carco"). Under the agreement between Commercial and Carco, Carco was to bear all freight charges. It was Carco that was to be responsible for the payment of all freight. Hence, the goods were shipped on a *freight collect* basis.

Penn Central Transportation Company was engaged to transport the steel from Detroit, Michigan, to the purchaser and consignee, Carco, in California. The steel was shipped by three rail cars. The goods were shipped at different times, two rail cars being shipped almost three weeks after the first car was shipped. (Stip. Nos. 14 and 19, Pet. App. at 20a)[1].

Southern Pacific acted as the delivering carrier to the purchaser-consignee, Carco. Since the shipment was freight collect, Southern Pacific was to collect the freight charges from Carco prior to relinquishing possession of the goods. Carco was not a credit patron of Southern Pacific, and it had never applied to Southern Pacific for any credit whatsoever. Southern Pacific had never made any deliveries to Carco before the delivery of the three subject rail cars. (Stip. Nos. 10 and 11, Pet. App. at 19a and 20a).

The first rail car was released to Carco by Southern Pacific on April 25, 1974. Contrary to the terms of the freight collect bill of lading, Southern Pacific did not collect any freight charges. Furthermore, Southern Pacific did not take any precaution to insure timely payment. (Stip. Nos. 16 and 17, Pet. App. at 20a).

At a time when the invoice for freight charges for the first load was in arrears, Southern Pacific released possession of the last two rail cars. The freight charges for the last two rail cars totalled $9,045.45. Southern Pacific, never-

---

[1] Citations to Petitioner's Appendix will appear as "Pet. App. at _____"

theless, released the two cars to Carco for two checks totalling only $8,145.46, almost $900.00 less than the proper amount. (Stip. Nos. 21-24, Pet. App. at 21a). The checks were dishonored and unpaid by Carco's bank. (Stip. Nos. 13 and 23, Pet. App. at 20a and 21a).

Hence, without investigating the creditworthiness of Carco, Southern Pacific:

1. Extended credit to Carco for all transportation charges for the first carload; and

2. Released the last two carloads to Carco at a time when payment for the first load was past due; and

3. Accepted two checks for the last two loads which were not only approximately $900.00 short of the proper amount, but also were backed by insufficient funds.

Both the Court of Appeals and the trial court found that Southern Pacific's actions violated the Interstate Commerce Act (hereinafter called the "Act"), and applicable rules and regulations of the Interstate Commerce Commission (hereinafter called the "Commission"). Both courts below also found that Southern Pacific's actions constituted the granting of preferential credit treatment to Carco.

It was not until two and one-half years later that Southern Pacific first notified Commercial that although all three cars had been released, the freight charges for the steel Commercial sold on a freight collect basis were unpaid. Commercial had sold the steel on a freight collect basis and naturally assumed that the freight charges had been paid. In the interim, Southern Pacific had filed suit against Carco. The ultimate disposition of that suit is unclear in this record, but it is assumed that Southern Pacific has not recovered from Carco.

Southern Pacific subsequently brought suit against Commercial for payment of the charges totalling $13,679.56.

The trial court found that Southern Pacific was negligent and held that Southern Pacific's violations of the Act constituted a defense to its claim against Commercial. The trial court held that it was fundamentally unfair and inequitable for Commercial to pay for the gross negligence of Southern Pacific. (Pet. App. at 16a.)

The Court of Appeals affirmed the take nothing judgment of the trial court by holding, "that the carrier's failure to comply with the applicable ICC regulations is a defense, available to Commercial, in an action by the carrier for unpaid freight charges." 641 F.2d at 239 (Pet. App. at 8a).

Southern Pacific filed a petition for rehearing *en banc*, but a majority of the judges in active service did not vote in favor of such *en banc* reconsideration. (Pet. App. at 10a). Southern Pacific also requested a rehearing by the panel which was also denied. (Pet. App. at 11a).

SUMMARY OF THE ARGUMENT

The Act prohibits a railroad from delivering any freight shipped by it until all charges have been paid, except under express conditions promulgated by the rules and regulations of the Commission. The applicable regulations provide that a railroad can extend credit for a specified number of days, if, and only if, the railroad takes precautions to insure timely payment of the charges. Had Southern Pacific observed these simple, but mandatory rules, this loss would not have occurred.

Southern Pacific took absolutely no precautions to insure timely payment from the consignee, Carco. Both courts below properly concluded that Southern Pacific thereby granted illegal preferential credit terms to Carco.

The Court of Appeals held that Southern Pacific's violations constitute a defense to its claim. Southern Pacific staunchly argues, however, that it is somehow immune from the consequences of its negligence and failure to observe the Commission's rules and regulations. Southern Pacific

urges that the holding of the Court of Appeals violates the purpose of the Commission's rules and regulations and the anti-discriminatory provisions of the Act. Such position is contrary to applicable case law, traditional principles of equity and the common law, and common sense.

Unlawful discrimination is involved when the question is the *amount* of the freight charge. Discrimination is not involved when the question is whether a particular party is responsible for a freight charge. For this reason, the Act does not purport to determine which party to a freight transaction shall be responsible for freight charges. Here, the issue is not the amount to be charged for transportation services. Rather, the issue is which party will be liable for them. Hence, the anti-discriminatory provisions of the Act are not involved.

Any unlawful actions involved with these shipments were committed by Southern Pacific. It was Southern Pacific, not Commercial, who granted preferential credit terms to Carco. It was Southern Pacific who violated the Act. It should not be allowed to employ the very Act which it violated to shift the losses caused by its violation onto Commercial.

The violations committed by Southern Pacific were of the precise type that the Commission's regulations were meant to prohibit. How can the public interest be best served by shielding Southern Pacific from the consequences of its illegal actions and instead, punishing Commercial for them?

The Court of Appeals correctly held that Southern Pacific's actions bar it from recovery. That holding should not be disturbed.

THE ARGUMENT

A. SOUTHERN PACIFIC'S VIOLATION OF INTERSTATE COMMERCE ACT.

Southern Pacific expressly violated the express prohibitions of the Act. The primary provision of the Act applicable to this case is 49 U.S.C. § 3(2)[2] entitled, "Payment of Freight as Prerequisite to Delivery." It provides as follows:

> "No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . ."

In other words, if a railroad delivers freight without receiving payment of the charges under circumstances not prescribed under the Commission's rules and regulations, the railroad has violated the Act.

The Commission promulgated the following regulation found at 49 C.F.R. § 1320.1:

> "The carrier, *upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified* in this part, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges . . . for a period of 4 days (or 5 days where retention or possession of freight by the carrier until tariff rates and charges

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[2] Subsequent to the occurrence of the operative facts of this case, said statute was recodified at 49 U.S.C. § 10743 (Supp. III 1979)

> thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part." (Emphasis supplied)

By regulation, therefore, the Commission has made two requirements for the granting of credit which are pertinent to the issues now under consideration. The first requirement is that the railroad must take precautions of at least some degree to assure timely payment of freight charges. Secondly, credit is not to be extended beyond the prescribed period of time.

As to the first requirement, it is undisputed that Carco, the consignee, was not a credit patron of Southern Pacific. Prior to the delivery of the three subject rail cars, Southern Pacific had never made deliveries to Carco. Carco never applied to Southern Pacific for any credit. It is undisputed that Southern Pacific delivered and relinquished the first carload of steel without ever investigating Carco's creditworthiness.

Both the trial court and the Court of Appeals held that under these circumstances, Southern Pacific's actions violated the Commission's regulations. How could it be argued otherwise? Despite the clear intent of the freight collect bill of lading, Southern Pacific delivered the first load without payment and took no precautions, whatsoever, to assure timely payment. The regulation demands that at least some precaution be taken to assure timely payment. See, *Consolidated Freightways Corp., Etc. v. Bergan,* 586 P.2d 1053, 1058 (Idaho 1978); *Mason & Dixon Lines v. Crossville Rubber Products,* 414 F. Supp. 166, 167 (M.D. Tenn. 1976). Therefore, the first requirement of the regulation was ignored.

The second requirement of the regulation was likewise violated. Southern Pacific mailed its invoice for the freight charges on the first carload on April 25, 1974. It delivered

the last two cars to Carco on May 16, 1974. Giving Southern Pacific the benefit of the most liberal interpretation of the regulations defining the date on which the invoice for the first car became past due, it would have been past due at least ten days to two weeks prior to Southern Pacific's release of the last two cars. Obviously, the last two cars' freight was released to Carco when the unpaid invoice for the first car was blatantly delinquent. Hence, the Commission's regulations again were ignored.

Furthermore, Southern Pacific accepted two checks for less than full payment of the last two cars. The checks were approximately $900.00 short of the proper amount and were backed by insufficient funds. Again, the regulations were ignored.

Southern Pacific's delivery of the last two cars, while ignoring the past due invoice for the first car and accepting less than full payment by means of checks backed by insufficient funds from a consignee whose creditworthiness had never been investigated, constituted a violation of the Commission's regulations. The trial court so held and the Court of Appeals affirmed such conclusion.

The general rule is that no railroad carrier may deliver any freight transported by it until the charges have been paid. *City of New Orleans, Etc. v. H. E. Schurig & Co.*, 357 So.2d 59, 60 (La. App. 1978). Section 3(2) of the Act is violated when a railroad delivers freight without collecting payment under circumstances not prescribed in the Commission's regulations. By Southern Pacific's negligence, it failed to comply with the regulations. It must be concluded, therefore, that Southern Pacific in this case was in direct violation of the Act.

B. SOUTHERN PACIFIC'S NEGLIGENCE AND VIOLATION OF ACT CONSTITUTES A DEFENSE TO ITS CLAIM

1. Development of Equitable Defenses to Freight Charge Claim

Historically, equitable defenses to claims for freight charges asserted by carriers were not favored. The classical situation arose when a carrier undercharged the consignee at the time of delivery of a shipment of goods and subsequently sued the consignee for the unpaid balance of the lawful tariff rate. Such was the situation in *Pittsburgh, C. C. & St. L. R. Co. v. Fink,* 250 U.S. 577, 40 S. Ct. 27, 63 L. Ed. 1151 (1919). Relying upon the mandate in the Act against the granting of preferences or practicing discrimination[3], the court held that the consignee was liable for the full sum fixed by the tariff. The court reasoned that in light of the Act, it is presumed that the consignee knows of the rate specified in the published tariff and hence impliedly agrees to pay such charge.

Subsequently, however, the Sixth Circuit held that the opinion in *Fink* did not, in every case, preclude the establishment of a defense by a consignee against a carrier for freight charges. *Davis v. Akron Feed & Milling Co.,* 296 F. 675 (6th Cir. 1924). A line of authorities then began to develop recognizing equitable defenses to carriers' actions for freight charges. If the purposes of the provisions of the Act prohibiting illegal preferences and unreasonable discrimination were not violated, courts often recognized equitable defenses to such claims.

For example, *Southern Pacific Transportation Co. v. Campbell Soup Co.,* 455 F.2d 1219 (8th Cir. 1972) was a suit by a carrier against the consignee of certain merchandise. The bill of lading accompanying the merchandise

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[3] 49 U.S.C. § 6(7) (1976) at the time of the operative facts herein and subsequently recodified at 49 U.S.C. § 10741 (Supp. III 1979)

indicated that the freight charges were to be prepaid. The consignee paid the shipper for the cost of the merchandise plus freight charges. The carrier was unable to make collection from the shipper and then asserted a claim against the consignee. The consignee defended the claim on the ground of estoppel because its payment to the shipper included a provision for freight charges. The consignee argued that in making its payment to the shipper, the consignee relied upon the notation on the bill of lading that the freight had been prepaid. In recognizing the equitable defense to the carrier's claim, the Court stated the following at p.1222:

> "We think that the crucial question in this case is whether judicial recognition of [the consignee's] estoppel defense will contravene the anti-discriminatory purpose of § 6(7) [of the Act]. We answer this question negatively and find substantial support for our conclusion. (Citations omitted). We discern no conflict here between recognition of (the consignee's) estoppel defense and the anti-discriminatory purpose of § 6(7) [of the Act]. . . . We hold that a consignee of goods who has paid the amount of the freight charges to the consignor may raise the defense of estoppel against a carrier's claim for freight charges."

See also, *Hilt Truck Lines, Inc.* v. *House of Wines, Inc.*, 299 N.W.2d 767 (Neb. 1980).

Perhaps the leading case recognizing the estoppel defense to a claim for freight charges is *Consolidated Freightways Corp. of Del.* v. *Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971). In that case, the court distinguished cases such as *Fink* that involved charging less than the lawful tariff rate from cases where the lawful tariff rate was charged, but there is a question of the proper party liable for payment. The court noted that in *Fink*, the existence of a party who was liable for the freight charges was not in issue. Rather,

it was the amount to be charged such liable party that was in question. *Id*, at p.61. The court stated the following at p.62:

> "So long as payment of the full tariff charges may be demanded from some party, the anti-discrimination policy of the Section is satisfied. Congress did not undertake to settle all issues of collection with the enactment of [the anti-discrimination section of the Act]. Nor did Congress intend to fashion a sword to insure collection in every instance and a shield to insulate the carrier from the legal consequences of otherwise negligent or inequitable conduct."

Therefore, the rule was firmly established that where the anti-discriminatory policies of the Act were not violated, a carrier could assert equitable defenses to a claim asserted against it by a carrier for freight charges. The anti-discriminatory policies of the Act were not violated when the issue did not involve the *amount* to be charged the responsible party. Accordingly, if the claim called for a determination of which party is liable for the freight charges, the policy of the Act prohibiting discrimination was not violated by recognizing an equitable defense.

Indeed, the trend of the cases of the last decade, and especially the more recent cases in both federal and state courts, has been to hold that a carrier will be barred from recovering freight charges when the policy of the Act against discrimination is not violated. *In Re Penn-Dixie Steel Corp.*, 6 B.R. 817 (S.D. New York 1980). It is not surprising, therefore, that courts have held that violations of the credit requirements of the Act can, under the proper circumstances, constitute a defense to a suit for the collection of freight charges.

In *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d 56, 60 (7th Cir. 1971), the court stated that it found no difficulty in holding the carrier estopped to col-

lect payment of freight charges where it violated the Commission's credit regulations. The court reasoned that the carrier created the risk of loss by its careless credit practices and contributed to the gravity of the loss. Likewise, in *Mason & Dixon Lines v. Crossville Rubber Products*, 414 F. Supp. 166 (M.D. Tenn. 1976), it was held that a carrier was estopped from collecting freight charges from a consignee where the carrier violated the Commission's credit regulations.

Subsequently, in *Brown Transportation Corp. v. Atcon, Inc.*, 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert denied* 439 U.S. 1014, 99 S. Ct. 626, 58 L. Ed.2d 687 (1978), it was again held that violations of credit regulations constituted a defense to a carrier's actions for freight charges. That case is strikingly similar to the case at bar. The freight in the cited case was shipped on a collect basis and section 7 of the bill of lading was unsigned. Seven months after delivery, the carrier realized that the consignee was in serious financial difficulty, and presented the bill to the shipper and demanded payment. The defendant defended the carrier's suit on the grounds of estoppel. The court held that the carrier had extended credit to the consignee for a period longer than that authorized by the regulations. Hence, the carrier's actions barred recovery from the consignor.

For other cases declaring that violations of the Commission's credit regulations constitutes a defense to an action by a carrier for freight charges, see, *Aero Mayflower Transit Co. v. Hofberger*, 532 S.W.2d 759 (Ark. 1976); *Aero Mayflower Transit Company v. Harbin*, 126 Ga. App. 72, 190 S.E.2d 91 (1972); *Allied Van Lines, Inc. v. Hanson*, 131 Ga. App. 506, 206 S.E.2d 108 (1974); *Checker Van Lines v. Siltek Intern., Ltd.*, 169 N.J. Super. 102, 404 A.2d 333 (1979); and *Westover v. United Van Lines, Inc.*, 154 Ga. App. 865, 270 S.E.2d 74 (1980).

2. Holding of Court of Appeals Does Not Contravene Anti-Discriminatory Purpose of Act

It is not surprising that courts would hold that violating the credit provisions of the Act constitutes a defense to a carrier's claim for freight charges. Unlike "undercharge" cases such as *Fink, supra,* the issue in credit violation cases is not the amount which must be paid for the transportation of freight. Rather, the issue is the identity of the party liable for such charges. If the full tariff rate has been charged to some person or entity, then a dispute over which entity will be liable does not involve the anti-discriminatory provisions of the Act. *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d 56, 63 (7th Cir. 1971).

It is with this background that the Court of Appeals held that Southern Pacific's numerous violations of the credit provisions of the Act precluded its recovery from Commercial. The Court's opinion is not contrary to the anti-discrimination provisions of the Act. Carco was charged the full tariff rate for transporting the subject goods. The issue involved is not the amount to be charged for transporting the goods. Rather, the issue is the identity of the party liable for such charges.

Furthermore, where is the favoritism to Commercial which is the malady sought to be abolished by the anti-discriminatory provisions of the Act? Commercial has not received any more than its purchase price from Carco. That price did not include freight charges. Commercial has not received any benefit as a result of the unpaid freight charges. No "windfall" has been experienced by Commercial.

The holding of the Court of Appeals does not result in any discrimination against any competitor of Commercial; nor does it discriminate against any locale or geographic region. As noted by both courts below, the party guilty of extending an illegal preference in this case is Southern Pacific. Southern Pacific illegally preferred Carco by granting it credit in a manner expressly forbidden by the Act.

To turn Southern Pacific's illegal preference against Commercial is illogical. Southern Pacific should not be allowed to fashion a sword from its own violations of the Act in order to recover losses caused by its own conduct.

The specter of the potential discrimination as painted by Southern Pacific causes one to contemplate the origin of such conduct. The true source of such danger lies in the potential of Southern Pacific or other carriers ignoring regulations designed to prevent such practices. Southern Pacific and other carriers should be discouraged from future violations of the Commission's regulations. That is the effect of the opinion of the Court of Appeals, and it should not be disturbed.

C. THE OPINION OF THE COURT OF APPEALS SHOULD NOT BE DISTURBED

In an effort to convince this Court that there is a division of authority on this subject, Southern Pacific cites *Bartlett-Collins Company v. Surinam Navigation Company,* 381 F.2d 546 (10th Cir. 1967). The holding in that case is distinguishable from the holding of the Court of Appeals below. In *Bartlett,* the shipper paid the freight charges to its forwarder who, in turn, issued due bills to be honored in three days to the carrier. The forwarder never honored the due bills, so the carrier never got paid. It was claimed that the carrier violated the credit provisions of the Act by accepting the due bills from the forwarder. It should be emphasized, however, that the forwarder acted as the shipper's agent in the transaction. Hence, the shipper's defense in that case was tantamount to the shipper arguing that since credit was extended to itself in violation of the Act, the shipper is therefore not liable for the charges. The holding of the Court of Appeals below makes no such rule.

To hold in *Bartlett* for the shipper would mean that the carrier could not demand payment of the full tariff charges from any party to the transportation contract. Clearly,

such holding would violate the anti-discrimination policies of the Act. See, *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d at p.62. Much to the contrary, in this case, the full tariff charges were made against Carco, hence not violating the anti-discriminatory provisions of the Act. Commercial does not contend nor did the court below hold that credit violations constitute defenses when to do such violates the anti-discriminatory provisions of the Act. Hence, the holding in *Bartlett* is consistent with the holding of the Court of Appeals below.

Furthermore, the *Bartlett* court did not find that the carrier's acceptance of the forwarder's due bills violated the Commission's credit regulations. In this case, it is undisputed that Southern Pacific violated the credit restrictions of the Act, and both courts below made express findings to such effect. Therefore, the court's opinion in *Bartlett* is distinguishable from the instant case and does not present a conflict between two Courts of Appeal.

Southern Pacific also relies upon *Consolidated Rail Corp. v. Containair Systems Corp.*, No. 80, Civ. 6814 (S.D. Ny., August 31, 1981) (reprinted in Pet. App. at 33a to 39a). That case, however, was not a claim for *transportation* charges. It was a suit to recover payment of detention and storage charges. The court noted that the Commission's credit regulations did not appear to apply to detention and storage charges. Furthermore, there was no evidence that the credit regulations were violated. The court nevertheless went on to hold in *dicta* that if they did so apply, violation of such regulations would not defeat the carrier's claim. Once again, to hold for the shipper in that case would be to hold that no party was responsible for the charges. No one could be charged the full tariff rate. Such is not the effect of the holding of the Court of Appeals below. Carco was charged the full tariff rate. So long as payment of the full tariff charges may be demanded from some party, the anti-discrimination policy of the Act is satisfied.

Southern Pacific further relies upon *Consolidated Freightways Corp. of Del. v. Eddy,* 513 P.2d 1161 (Or. 1973). In that case, the Court found that any credit extensions by the carrier were involuntary. In an absence of evidence, the court in the cited case inferred that the carrier promptly sought to collect the freight charges from the shipper and thereafter diligently attempted to collect them. It was accordingly concluded that any extensions of credit in violation of the Commission's regulations were involuntary. Commercial does not contend, nor does the opinion of the Court of Appeals below hold, that involuntary credit extensions constitute a defense to the charges. In this case, however, it is clear that Southern Pacific was negligent and such negligence resulted in the credit violations. Hence, Southern Pacific's violations were voluntary. Also, in the cited case, there is no discussion about how the credit violations caused the loss in question. In this case, it is undisputed that the credit violations were a direct cause of the loss. Therefore, the cited case is likewise distinguishable from the case at bar and does not present a conflict between it and the opinion of the Court of Appeals.

Southern Pacific further argues that the decision of the Court of Appeals is improper because it somehow is contrary to the purpose of the Commission's credit regulations. Southern Pacific's argument in this regard is certainly advantageous to the ultimate collection of its receivables, it being incapable of doing any wrong.

When the regulations were promulgated, shippers were generally not regulated by the Commission. See, *Regulations for Payment of Rates and Charges,* 326 I.C.C. 483, 490 (1966). However, that does not mean that the actions of the Commission are taken without taking the needs of the public, including shippers, into consideration. Actions of the Commission are always in the public interest.

The Commission has observed that shippers are the major cause of violations of credit regulations. That, how-

ever, is because of shippers refusing to pay on a timely basis. In such a case, any violation of credit regulations are involuntary on the part of the carrier. An involuntary violation of the credit regulations is not involved in this case. Here, the violation is clearly voluntary in that it was caused by the carrier's negligence or gross negligence. The extension of credit here is precisely the type of action the credit regulations were intended to prohibit.

Southern Pacific's position would result in a license being issued to all common carriers to violate the Commission's credit regulations. Such would undermine the purpose of the regulations. This Court should not be so persuaded.

Lastly, Southern Pacific contends that this dispute involving approximately $13,000.00 is of such national import to warrant consideration by this Court. However, the holding of the court below is limited to situations where the anti-discriminatory policy of the Act is not disturbed. It is limited to a situation where the carrier's negligence results in a violation of the credit provisions of the Act which, in turn, causes the loss. It is further limited to situations where the full tariff charges can be made to some party.

Southern Pacific's actions in this case constitute a blatant disregard for the standards outlined by the Commission in its credit regulations. Southern Pacific extended credit to Carco for all transportation charges for the first carload without ever investigating its creditworthiness. It released the last two carloads to Carco when the account for the first load was blatantly delinquent. Southern Pacific released the last two carloads to Carco for two checks which were almost $900.00 short of the proper amount, thereby extending an additional $900.00 credit to Carco without taking any precautions, whatsoever.

Although there are no supporting surveys in the record, Commercial trusts that such blatant violations of the Act

initiated by carriers are uncommon and are not of great national import to the transportation industry. The decision of the Court of Appeals below should be left undisturbed as a deterrent to future violations. This Court should not grant common carriers a license to unabashedly violate valid regulations promulgated by the Commission.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari herein should be, in all respects, denied.

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CERTIFICATE OF SERVICE

Counsel for Respondent, a member of the bar of the Supreme Court of the United States hereby certifies that Counsel for Petitioner James H. Pipkin, Jr., Charles G. Cole, Steven Reed, Michael R. Johnson and Harold Lentz have been served with three copies each of the foregoing Brief In Opposition To Petition For Writ of Certiorari at their respective post office addresses by depositing the documents in a United States Post Office or mailbox with first class postage prepaid.

All parties required to be served have been served.

Dated: October 27, 1981

David M. Sudbury

Petitioner's Reply Brief

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No. 81-622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

v.

COMMERCIAL METALS CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

In its Petition for a Writ of *Certiorari*, petitioner Southern Pacific Transportation Company argued that the rule of law adopted below is in conflict with the decisions of other state and federal courts, that the issue is a recurring one of great practical importance for the nation's railroads, and that a defense of estoppel based upon a carrier's violation of ICC credit regulations contravenes the purpose of the regulations themselves.

Rather than answer these points directly, respondent Commercial Metals Company has chosen to argue particular facts which it believes justify the result reached by the lower court. Respondent has not fairly depicted the facts and equities of this situation. Nor can it succeed in arguing that the rule adopted by the Court of Appeals is limited to the facts in this case. More importantly, respondent has done nothing to rebut petitioner's demonstration of a genuine conflict among the

state and federal courts on this issue, which, unless resolved by this Court, will continue to plague all federally regulated carriers and to fill the nation's courts with unnecessary litigation.

I. RESPONDENT HAS NOT DISPROVED THE EXISTENCE OF A GENUINE CONFLICT ON THE RECURRING ISSUE RAISED BY THIS CASE

The decision below squarely holds that a violation of the credit regulations by a carrier gives rise to an equitable defense precluding the carrier from collecting the freight charge. 641 F.2d 235, 239 (5th Cir. 1981), App. at 1a, 8a. At least seven state and federal courts have held, with equal firmness, that a credit violation does *not* give the shipper a defense in an action for the unpaid freight charge.

Respondent does not deny that a conflict exists. Indeed, respondent has not even tried to distinguish the decisions of the Supreme Court of New Hampshire and three other state appellate courts which have plainly rejected the credit violation defense adopted in this case. *See American Red Ball Transit Co. v. McCarthy*, 114 N.H. 514, 323 A.2d 897 (1974), *cert. denied*, 420 U.S. 930 (1975); *AAA Trucking Corp. v. Spherex, Inc.*, 110 N.H. 472, 272 A.2d 594 (1970) (*per curiam*); *Western Maryland Railway v. Cross*, 96 W. Va. 666, 123 S.E. 572 (1924); *Arizona Feeds v. Southern Pacific Transportation Co.*, 21 Ariz. App. 346, 519 P.2d 199 (1974); *East Texas Motor Freight Lines v. Franklin County Distilling Co.*, 184 S.W.2d 505 (Tex. Civ. App.—El Paso 1944, no writ).

Respondent does attempt to minimize the conflict by isolating particular facts of some of the other cases contrary to the decision below. *See Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546 (10th Cir. 1967) (discussed in Brief in Opposition at 14-15); *Consolidated*

Rail Corp. v. Containair Systems Corp., No. 80-6814 (S.D.N.Y. Aug. 31, 1981) (discussed in Brief in Opposition at 15). Not only are these asserted distinctions immaterial,[1] but respondent ignores the actual legal conclusions reached by those courts. In *Containair*, for example, the court concluded, "[N]othing in the [ICC rail carrier credit] regulation permits the cancellation of charges payable in accordance with legal tariffs as a sanction for untimely billing." Slip op. at 7, App. at 39a. And the Tenth Circuit likewise ruled that "[f]orfeiture of the freight is nowhere provided as a penalty for violation of [the credit statute]." 381 F.2d at 549.

Respondent's attempt to distinguish the *en banc* holding of the Supreme Court of Oregon in *Consolidated Freightways Corp. of Delaware v. Eddy*, 266 Or. 385, 513 P.2d 1161 (1973), is equally unpersuasive. The credit violation in the present case was no more "voluntary" than the one in *Eddy*.[2] More importantly, the court below clearly did not premise its decision on any assessment of the "voluntariness" of Southern Pacific's actions. Neither the credit regulations nor the decisions of other courts recognize this concept. Rather than harmonizing the conflicting federal and state decisions, respondent's theory only adds to the confusion.

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[1] Far from being distinguishable, *Bartlett-Collins* was, if anything, a stronger case for estoppel than this one. Even though the consignor had already paid the freight charge to the freight forwarder, the Tenth Circuit required the consignor to pay the carrier as well. Respondent's assertion that the Tenth Circuit did not find a credit violation in *Bartlett-Collins* is misleading. The court assumed that there had been a violation of the credit statute, but nevertheless rejected the estoppel defense. 381 F.2d at 549.

[2] In both cases the carrier, having first delivered the freight to the consignee without receiving payment in advance, "thereafter diligently attempted to collect from the shipper. . . ." 513 P.2d at 1166. Southern Pacific's attempts to collect are detailed in the stipulation of facts. App. at 22a-24a.

The conflict on the issue raised by this case has been noted by judges in the lower courts[3] and by Justices of this Court.[4] Respondent offers no reason to suggest that the conflict will disappear or that this issue will not be a recurring one. The Court should take this opportunity to provide a definitive resolution to this controversy.

II. THE DECISION BELOW IS INCONSISTENT WITH WELL ESTABLISHED LEGAL AND EQUITABLE PRINCIPLES

Despite respondent's attempt to focus on the merits of its position, the Brief in Opposition fails to present a coherent rationale for the legal conclusion of the court below. Respondent admits that equitable defenses to collection of the lawful freight charge are not favored. Brief in Opposition at 9.[5] Respondent relies, however, on a line of cases in which an equitable defense was recognized because the carrier represented to the consignee that the freight was prepaid and the consignee was thereby threatened with having to make a double payment. Respondent quotes at length, for example, from the opinion of the Court of Appeals for the Eighth Cir-

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[3] Southern Pacific Transportation Co. v. Commercial Metals Co., No. CA3-77-0467-F (N.D. Tex. Feb. 26, 1979), App. at 15a-16a; *cf.* Metro Shippers, Inc. v. Life Savers, Inc., 509 F.Supp. 606, 613 (D.N.J. 1980), quoted in Petition at 13 n.12.

[4] Brown Transportation Corp. v. Atcon, Inc., 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014 (1978) (dissenting opinion of Justices White and Blackmun).

[5] Respondent fails to acknowledge, however, the many cases which have denied such defenses altogether. *See* cases cited in Petition for Certiorari at 11. Moreover, respondent completely ignores this Court's repeated statements that "equitable considerations" do not justify failure of a carrier to collect the lawful freight charge. *E.g.*, Baldwin v. Scott County Milling Co., 307 U.S. 478, 485 (1939); Louisville & Nashville Railroad v. Central Iron & Coal Co., 265 U.S. 59, 65 (1924).

cuit in *Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972). But as the Petition for Certiorari pointed out (at 15), the Eighth Circuit has expressly limited *Campbell Soup* to the double payment situation. *Chicago, Burlington & Quincy Railroad v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973). Respondent's other primary authority—*Consolidated Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971)—is a case of the same type.

This line of cases is inapplicable here. Respondent does not allege any misrepresentation on the part of Southern Pacific. There is no threat of double collection or double payment. Respondent has made no effort to show why recovery should be barred under the classic doctrines of equity. Respondent simply argues that petitioner should be estopped from recovering the lawful freight charge because of petitioner's alleged "gross negligence" in collecting from the consignee. "Gross negligence" was not the basis for the decision of the Court of Appeals in this case. Moreover, the record will not support an inference of "gross negligence." Stripped to its essentials, Southern Pacific's credit violation consisted merely of failing to realize that Carco was not an approved credit patron before releasing the first car.[6] Re-

[6] As to the second and third cars, Southern Pacific refused to release the cars until it had received checks in payment of the freight charges. Respondent has not denied that such payment by check is a commercially acceptable practice. One check was inadvertently accepted for an incorrect amount—$2,383.67 instead of $3,283.66. While the stipulated facts do not explain this discrepancy, a transpositional error in the first two digits is apparent. A freight bill for the correct amount was issued within four days of delivery. As to the third car, a check for the full amount was obtained prior to release. Respondent has not provided any reason why Southern Pacific should be estopped from collecting the freight charges for this car. Indeed, respondent has failed to explain why Southern Pacific's insistence on receiving payment by check before releasing the cars did not constitute full compliance with the ICC

spondent has cited no equitable doctrine holding that such conduct will release a consignor from its role as ultimate guarantor of payment.

In its attempt to lay all blame for the present state of affairs on Southern Pacific, respondent ignores the legal relationships that allocated the risk of loss between the parties. The standard bill of lading used by Commercial Metals contained a provision that, if executed, would have shifted the risk of nonpayment from Commercial Metals to Southern Pacific. Under well established and unchallenged legal principles, Commercial Metals' failure to execute this provision—the so-called non-recourse clause—rendered it primarily liable for the freight charge. *E.g., Illinois Steel Co. v. Baltimore & Ohio Railroad*, 320 U.S. 508, 513 (1944).[7]

This allocation of the risk of the consignee's insolvency is not unfair or unreasonable. Commercial Metals—not Southern Pacific—chose to do business with Carco. Commercial Metals presumably had knowledge of Carco's ability to pay; it nonetheless shipped the goods without requiring prepayment of the freight charge. By failing to execute the non-recourse clause, it implicitly agreed to be liable for any freight charges not paid by Carco. Southern Pacific, which never had any direct contact with Commercial Metals, simply received the freight

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credit regulation, which simply requires that the railroad must take "precautions deemed by it to be sufficient to assure payment of the tariff charges. . . ." 49 C.F.R. § 1320.1 (1980), App. at 27a.

[7] Respondent emphasizes the fact that these shipments were sent on a "freight collect" basis. *See* Brief in Opposition at 2. A "freight collect" agreement is an arrangement between the buyer and seller for the collection of transportation cost. It does not affect their obligations to the carrier, and it is well settled that a freight collect agreement does not release the consignor from its liability under the bill of lading. *See* cases cited in Petition for Certiorari at 6 n.5.

from a connecting carrier and delivered it in accordance with the bill of lading to a company with which Southern Pacific had not had prior experience. Southern Pacific was then required to pay the receiving and connecting carriers their shares of the freight charges. In view of these facts, it is not inequitable to expect Commercial Metals to pay the freight charges consistent with the bill of lading.

Respondent argues that "Southern Pacific and other carriers should be discouraged from further violations of the Commission's regulations." Brief in Opposition at 14. Respondent ignores the fact that other remedies, including cease-and-desist orders, injunctions and civil forfeitures, are expressly provided to deter violation of the regulations. Moreover, railroads do not profit by violations of the credit rules. An unwise extension of credit can only result, as it did here, in delay, litigation expense, and the possibility of nonpayment. Because the economics of the situation provide powerful disincentives to violation, an estoppel defense created by judicial decision is not only unjustified, but unnecessary as well.

Finally, respondent has totally failed to answer petitioner's argument that an equitable defense which precludes collection of the lawful freight charge is at odds with the purpose of the credit regulations. As the Petition for Certiorari demonstrated in considerable detail, the regulations were originally adopted to provide railroads with a legal basis for resisting excessive demands for credit. Prior to 1971, no court had ever suggested that a violation of these regulations might reallocate the risk of the consignee's bankruptcy from the shipper to the carrier. Conflict and confusion are inevitable when regulations are suddenly reinterpreted to accomplish a purpose which they were never designed to achieve.

This Court should act now to settle this question of urgent importance for the railroads and other regulated carriers doing business in different parts of the nation.

Respectfully submitted,

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Petitioner's Brief

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IN THE
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OCTOBER TERM, 1981

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,
v.
COMMERCIAL METALS CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a consignor which agreed to be primarily liable for the freight charges on an interstate shipment can lawfully refuse to pay those charges because the railroad failed to collect from the consignee in accordance with the credit regulations of the Interstate Commerce Commission.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

Petitioner's parent company is Southern Pacific Company. The partially owned subsidiaries and affiliates of the petitioner are:

St. Louis Southwestern Railway Co.
The Ogden Union Railway & Depot Co.
Portland Traction Company
Portland Terminal Railroad Co.
Sunset Railway Company
Central California Traction Company
Trailer Train Company

The wholly and partially-owned subsidiaries and affiliates of St. Louis Southwestern Railway Co. are:

Alton & Southern Ry. Co.
Arkansas & Memphis Ry. Bridge & Terminal Co.
Dallas Terminal Ry. & Union Depot Co.
St. Louis Southwestern Ry. Co. of Texas
Southern Illinois & Missouri Bridge Co.
Southwestern Transportation Co.
Terminal R.R. Association of St. Louis
Glascar Inc.
Main Street Warehouse Company
The Southwestern Town Lot Corp.
Kansas City Terminal Railway Co.
Trailer Train Company

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IN THE

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SOUTHERN PACIFIC TRANSPORTATION CO.,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 641 F.2d 235 (5th Cir. 1981), and appears in the Joint Appendix (J.A.) at 27-34. The opinion of the District Court for the Northern District of Texas, which has not been reported, appears at J.A. 21-25.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 30, 1981. A timely petition for rehearing *en banc* was denied on June 29, 1981. Subsequently, the court of appeals granted petitioner leave to file out of time a petition for rehearing by the panel, which petition was denied on July 21, 1981. A petition for a writ of certiorari was filed with this Court on September 28, 1981 and was granted on November 16, 1981. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 3(2) of the Interstate Commerce Act, 49 U.S.C. § 3(2) (1976), subsequently recodified at 49 U.S.C. § 10743 (Supp. III 1979), is set forth in the appendix to this brief at 1a to 2a. Sections 1320.1 through 1320.17 of the regulations promulgated under this provision, 49 C.F.R. §§ 1320.1-.17 (1980) (sometimes referred to as the ICC's credit regulations), are set forth in the appendix to this brief at 3a to 7a.

STATEMENT OF THE CASE

Petitioner Southern Pacific Transportation Company ("Southern Pacific") brought suit in the District Court for the Northern District of Texas against respondent Commercial Metals Company ("Commercial Metals") to recover the freight charges on three shipments of steel cobble shipped by rail in April and May of 1974 from Detroit, Michigan, to Alhambra, California. The case was tried on a stipulated record.[2]

Each of the three shipments was consigned by Commercial Metals to the initial carrier, Penn Central Transportation Company ("Penn Central"),[3] under a uniform straight bill of lading as prescribed by the Interstate Commerce Commission ("ICC"). Under section 7 of the

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[1] Section 3(2) pertains to rail carriers. Similar sections relating to motor carriers and water carriers, also recodified at 49 U.S.C. § 10743 (Supp. III 1979), and a portion of the regulations issued under them, have been reprinted in the Appendix to the Petition for Certiorari (Pet. App.) at 28a to 32a.

[2] A copy of the Stipulation of Facts appears in the Joint Appendix at 14-20. References to the Stipulation will be in the form "Stip. No. ——, J.A. ——."

[3] Each of the three shipments moved over the lines of the Penn Central, the St. Louis Southwestern Railway Company, (a subsidiary of petitioner), and the Southern Pacific. Pursuant to an interline agreement, Southern Pacific has already paid the other two carriers their proportionate share of the freight charges earned on these shipments. Stip. No. 9, J.A. 15.

bill of lading, Commercial Metals, as consignor of the goods, could have limited its liability for the freight charges by executing the non-recourse clause on the face of the bill of lading.[4] It did not. Stip. No. 7, J.A. 15. As a result, Commercial Metals was primarily liable for any freight charges not paid by the consignee.

The first of the three shipments, consisting of a railcar of steel cobble, was tendered to the Penn Central on April 11, 1974 for shipment to the designated consignee, Carco Steel Corporation ("Carco") in Alhambra, California. Stip. No. 14, J.A. 16. On April 25, 1974, Southern Pacific delivered this railcar to Carco without collecting the freight charge in advance. Instead, a freight bill for the correct amount—$4,634.11—was mailed to Carco on the same day the car was delivered. Stip. Nos. 16-18, J.A. 16. Carco's credit-worthiness had not been investigated by Southern Pacific, Stip. No. 11, J.A. 15, and Carco did not pay the freight bill.

On May 2, 1974, Commercial Metals consigned two more railcars of steel cobble to Penn Central for shipment to Carco. These cars were delivered by Southern Pacific to Carco on May 16, 1974, but only after Southern Pacific obtained from Carco two checks in the amount of $5,761.79 and $2,383.67 in payment of the freight charges. Stip. No. 21, J.A. 17. The correct freight charges due for the two shipments were $5,761.79 and $3,283.66. On May 20, 1974, Southern Pacific issued freight bills for the correct amounts to Carco. Stip. No.

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[4] The consignor executes the non-recourse clause by signing this provision, which is printed on the bill of lading: "Subject to Section 7 of Conditions, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and other lawful charges." *See* In re Bills of Lading, 52 I.C.C. 671, 721 (1919). This provision appeared on each of the three bills of lading involved in this case. Stip. Nos. 6-7, J.A. 15.

24, J.A. 17. Carco's bank subsequently dishonored the two checks. Stip. No. 23, J.A. 17.

On August 23, 1974, after further efforts to collect the unpaid freight charges from Carco had proved fruitless, Southern Pacific brought suit against Carco in the Superior Court of California, Los Angeles County. Stip. No. 29, J.A. 18. Repeated attempts to serve the summons and complaint on Carco were unsuccessful. Stip. Nos. 36-40, 43, 45, J.A. 18-20. On December 17, 1976, Southern Pacific notified Commercial Metals of Carco's failure to pay the freight charges and requested that Commercial Metals, as a consignor which did not execute the non-recourse provision in the bill of lading, pay the $13,679.56. Stip. No. 41, J.A. 19. When payment was not forthcoming, Southern Pacific instituted the present action in the district court on April 8, 1977, invoking the court's jurisdiction under 28 U.S.C. § 1337. Stip. Nos. 4, 44, J.A. 15, 20.

The district court concluded that Southern Pacific had "established a prima facie case for the recovery of the freight charges" from Commercial Metals, so that Commercial Metals was liable "[a]bsent a showing of valid and affirmative defenses." J.A. 22-23. The court then held, however, that Commercial Metals had established a valid equitable defense by virtue of Southern Pacific's failure to comply with the credit regulations promulgated by the ICC under section 3(2) of the Interstate Commerce Act, 49 U.S.C. § 3(2). J.A. 23.

The court of appeals affirmed the judgment of the district court, observing that the

> sole question presented by this appeal is whether the failure of a carrier to comply with credit regulations promulgated under the Interstate Commerce Act is a defense available to a consignor . . . who

failed to execute a nonrecourse provision in the relevant bill of lading.

641 F.2d at 235-236, J.A. 27. "[W]e are compelled to hold," the court of appeals concluded, "that the carrier's failure to comply with the applicable ICC regulations is a defense, available to Commercial, in an action by the carrier for unpaid freight charges." *Id.* at 239, J.A. 34.

SUMMARY OF ARGUMENT

I. The rights and liabilities of parties to an interstate freight shipment are governed by a uniform bill of lading, the terms of which are prescribed by the Interstate Commerce Commission. Under the uniform bill of lading, the consignor has the option of disclaiming primary liability for the freight charges by executing the so-called non-recourse clause on the face of the bill of lading. If the consignor fails to sign the non-recourse clause, however, it thereby becomes primarily liable for the freight charge. Once this occurs, no action, contract or representation by the carrier can release the consignor from its obligation. Any other rule would open the door to discrimination and favoritism. Indeed, in view of the historic purpose of the Interstate Commerce Act to eliminate discrimination, this Court has repeatedly indicated an unwillingness to recognize any equitable defenses under the Act. *E.g., Midstate Horticultural Co. v. Pennsylvania Railroad*, 320 U.S. 356, 361 (1943).

In the interstate transportation system, certainty of payment and uniformity of rates are paramount concerns. Equitable defenses created by the courts introduce elements of subjectivity and uncertainty that can lead to conflicting decisions and increased litigation. If recourse against the consignor can be defeated by events occurring after a shipment has been transported, carriers may be obliged to eliminate or sharply curtail ex-

tensions of credit to both consignors and consignees, thereby interfering with the free flow of commerce. To prevent this result, the Court should reaffirm the traditional rule that the bill of lading provides the exclusive means by which a consignor may relieve itself from liability.

II. Even if equitable defenses were available under the Act in some circumstances, the particular defense adopted by the court below, a defense premised on violation of the ICC's credit rules, would be unwarranted. The statute authorizing the ICC to promulgate credit regulations—first passed in 1920—is entirely silent on the subject of affirmative defenses to freight charge actions. The regulations themselves likewise make no mention of any such defense. Indeed, in view of the absence of any reference to this defense in the governing statute, the ICC has recently taken the position that a violation of the credit rules has no "effect" on the consignor's liability under the bill of lading. *C-G-F Grain Co. v. Atchison, Topeka and Santa Fe Railway*, 351 I.C.C. 710, 712 (1976).

Moreover, the legislative history of the credit regulations makes clear that the purpose behind the rules was not to relieve consignors from liability for freight charges but rather to protect carriers against depletion of their working capital and prevent discrimination among recipients of credit. Judicial decisions contemporaneous with the promulgation of the regulations refused to recognize an affirmative defense arising from a violation. *See Western Maryland Railway v. Cross*, 96 W. Va. 666, 123 S.E. 572 (1924); *Chicago Junction Railway v. Duluth Log Co.*, 161 Minn. 466, 202 N.W. 24 (1925). For more than 50 years, no court or administrative official adopted—or even suggested—a contrary interpretation of the rules.

In addition, strong policy reasons counsel against implication of an equitable defense from these regulations. The ICC already has a number of statutory remedies at its disposal for enforcement of the credit rules. These remedies can be applied with discretion to effectuate the purposes of the rules while preserving sufficient carrier flexibility to permit the credit system to operate. The defense adopted below, by contrast, is inflexible and arbitrary. The ICC itself has remarked that the credit regulations are "not realistic for many of the situations in which they apply," *Ex Parte Nos. MC-1, 73, 143 and 170*, 45 Fed. Reg. 31766 (1980), and that violations are often caused by shippers rather than carriers. As this case illustrates, adoption of a defense which permits the consignor to escape liability for the freight charge whenever a supposed "credit violation" can be shown may penalize a carrier for actions—such as accepting a check in payment of the freight charge—which the ICC never meant to prohibit.

Whatever the need for defenses to protect the consignee, the bill of lading already provides the consignor with an effective means of protecting itself from liability in circumstances such as these. Judicial implication of an unprecedented defense relieving consignors of their legal duty to pay the freight charge will serve only to provide an undeserved windfall to consignors and disrupt the transportation system.

ARGUMENT

I. THE UNIFORM BILL OF LADING GOVERNS THE LIABILITY OF PARTIES TO AN INTERSTATE FREIGHT SHIPMENT AND PROVIDES THE EXCLUSIVE MEANS BY WHICH A CONSIGNOR CAN BE RELEASED FROM LIABILITY

Since 1919, the ICC has prescribed a uniform bill of lading for use on all interstate shipments of freight by rail. *See In re Bills of Lading*, 52 I.C.C. 671 (1919), *modified*, 64 I.C.C. 357 (1921), *modified*, 66 I.C.C. 63 (1922).[5] The bill of lading is the basic contract between the shipping party—the consignor—and the carrier. Unless the bill of lading explicitly provides to the contrary, the consignor is presumed to be primarily liable for the freight charges. As the Commission stated when it first promulgated the uniform bill of lading:

> The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is entitled to look to the consignor for his charges.

In re Bills of Lading, 52 I.C.C. 671, 721 (1919).[6] The issue of a consignor's liability, the Commission has said

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[5] The form of the uniform bill of lading has been modified several times since 1922, *see, e.g.*, In re Bills of Lading, 245 I.C.C. 527 (1941), but only the 1921 and 1922 modifications affected the provisions of the bill of lading relevant to this case.

[6] The reference to receipt and transport of the goods under circumstances clearly indicating an exemption for the consignor refers to the situation where it can be shown, "by the bill of lading or otherwise, that the shipper of the goods was not acting on his own behalf; that this fact was known by the carrier; that the parties intended not only that the consignee should assume an obligation to pay the freight charges, but that the shipper should not assume any liability whatsoever therefor." Louisville & Nashville R.R. v. Central Iron & Coal Co., 265 U.S. 59, 67-68 (1924).

more recently, "is governed by the bill of lading contract between the parties and must be decided by interpreting that contract." *C-G-F Grain Co. v. Atchison, Topeka and Santa Fe Railway*, 351 I.C.C. 710, 712 (1976).

While the railroad has a right to require prepayment of the freight charge by the consignor, this right is typically waived to permit deferral of payment until the goods have been transported. *In re Bills of Lading*, 52 I.C.C. at 721. Where payment is deferred in this fashion, the carrier and the consignor may agree either that the consignor will continue to be liable for the freight charge, or that the consigor will be released from liability if the carrier delivers the goods to the receiving party—the consignee—without collecting the charge in advance. The exclusive means by which the consignor can obtain such a release is by signing the following stipulation which appears on the face of the bill of lading: "Subject to Section 7 of Conditions, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and other lawful charges." *See* 52 I.C.C. at 721. Section 7 of the prescribed conditions of the bill of lading explains this stipulation in more detail:

> The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges.

In re Bills of Lading, 64 I.C.C. 357, 364A (Appendix D) (1921).

Where the consignor fails to execute this so-called nonrecourse provision of the bill of lading, it continues to

be primarily liable for the freight charge.[7] As this Court stated in *Illinois Steel Co. v. Baltimore & Ohio Railroad*, 320 U.S. 508, 513 (1944):

> [I]f the non-recourse clause is not signed by the consignor, he remains liable to the carrier for all lawful charges. The carrier is free to demand payment in advance by the consignor, or it may decline to make delivery to the consignee until the freight charges are paid or guaranteed, or if delivery is made to the consignee without payment, the consignee is also liable for all freight charges.

The carrier ordinarily will look first to the consignee for payment of the freight charge in these situations, but if for any reason the consignee fails to pay the full charge, the carrier has recourse against the consignor.[8]

The non-recourse clause thus permits the consignor either to avoid liability for—or to guarantee payment of—the freight charge. If the consignor does not sign the stipulation on the face of the bill of lading, it in effect represents to the carrier that the carrier can recover from the consignor any part of the freight charge not collected from the consignee. The carrier may take into account the consignor's non-execution of this clause in deciding whether to require advance payment of the freight charge or in deciding what precautions to take before extending credit to the consignee. In either event, it plainly would be inequitable to permit the consignor

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[7] As one court has observed, "[T]he uniform bill of lading expressly accords the shipper the privilege of absolving himself from liability for charges by executing the nonrecourse clause and thereby excludes implication of a right to attain the same object in some other and undefined way." New York, N.H. & H.R.R. v. California Fruit Growers Exch., 125 Conn. 241, 241-42, 5 A.2d 353, 359, *cert. denied*, 308 U.S. 567 (1939).

[8] *See, e.g.*, New York Cent. R.R. v. Federal Sugar Ref. Co., 235 N.Y. 182, 187, 139 N.E. 234, 235 (C.A.N.Y. 1923); New York, N.H. & H.R.R. v. Tonella, 79 N.H. 464, 466, 111 A. 341, 342 (1920).

to escape the consequences of its own undertaking *after* the carrier has rendered the transportation service requested by the consignor.[9]

More is at stake in this case, however, than the railroad's simple right to collect a freight charge which is lawfully owed to it. A carrier has "not only the right, but the duty to recover its proper charges for the services performed." *Akers Motor Lines, Inc. v. Lady Cornell Comb Co.*, 203 F. Supp. 156, 157 (D. Mass. 1962). As the ICC said in an early case, "The carrier may waive its right to demand prepayment and accept a shipment with the understanding that it will collect the charges upon delivery to consignee; but if it does not collect such charges from the consignee it *must* look to the consignor for payment. The collection of the lawful rate is a duty imposed on the carrier by law . . . ." *Boise Commercial Club v. Adams Express Co.*, 17 I.C.C. 115, 121 (1909) (emphasis added). Justice Brandeis, writing for the Court in *Louisville & Nashville Railroad v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924), made the same point. "No contract of the carrier," he said, "could . . . release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor." *See also Great Northern Railway v. Hyder*, 279 F. 783, 786 (W.D. Wash. 1922).

Any other rule would be contrary to the historic purpose of the Interstate Commerce Act, which was to eliminate the discrimination and favoritism which plagued

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[9] Indeed, the Supreme Court of North Carolina has held, on similar facts to these, that a consignor which failed to execute the non-recourse clause, and which accepted the benefits of transport of the goods, "estopped itself to deny liability to the plaintiffs for the freight charges." Griggs v. Stoker Service Co., 229 N.C. 572, 578, 50 S.E.2d 914, 918 (1948) (*per* Ervin, J.).

the railroad industry in the late nineteenth century.[10] As this Court observed in *Midstate Horticultural Co. v. Pennsylvania Railroad*, 320 U.S. 356, 361 (1943) (footnote omitted):

> The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This "obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 [1915].

Permitting the conduct of the carrier—in this case its credit practices—to affect the terms of the bill of lading would open the door to surreptitious discrimination in the guise of "accidental" credit violations, intended to release a favored shipper from liability. *See, e.g., Norfolk & Western Railway v. Williamson Grocery Co.*, 103 W. Va. 532, 537, 138 S.E. 102, 104 (1927). As this Court has said, the view that a carrier could "by its con-

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[10] "[T]he great purpose of the act to regulate commerce," the Court said in New York, N.H. & H.R.R. v. ICC, 200 U.S. 361, 391 (1906), "whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination." *See also* United States v. Braverman, 373 U.S. 405, 406-09 (1963); Union Pac. R.R. v. United States, 313 U.S. 450, 461-62 (1941); United States v. Koenig Coal Co., 270 U.S. 512, 519 (1926); Illinois Cent. Gulf R.R. v. Golden Triangle Wholesale Gas Co., 586 F.2d 588, 592 (5th Cir. 1978).

duct give the shipper the right to ignore [the] terms [of the bill of lading] which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations . . . would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." *Georgia, Florida & Alabama Railway v. Blish Milling Co.*, 241 U.S. 190, 197 (1916).[11]

The principle that the carrier cannot, by any act or omission of its own, vary the liability of the consignor under the bill of lading is illustrated by the unbroken line of cases holding that the carrier's failure to collect from the consignee does not release the consignor from liability, even if the carrier and the consignor have agreed that the shipment should be "freight collect." *See, e.g., Consolidated Freightways Corp. of Delaware v. Pacheco International Corp.*, 488 F. Supp. 68 (C.D. Cal. 1979); *New York, New Haven & Hartford Railroad v. California Fruit Growers Exchange*, 125 Conn. 241,

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[11] The Court of Appeals of Alabama, in a frequently cited opinion, has explained further how discrimination is facilitated by judicially implied equitable defenses:

> [T]he carrier cannot, by any act, estop itself from exacting the lawful freight rate. If the carrier could so estop itself, then it would lie within the carrier's power, by purposely putting itself in a position where it could not exact the lawful rate of a shipper it desired to favor, to render nugatory one of the main designs of the act, the prevention of discrimination between shippers; and for the law to countenance the doctrine of estoppel in cases like this is for the law to say through the courts that the carrier is estopped from doing what the statute mentioned plainly requires that it must do—collect the lawful rate in all cases, and nothing greater and nothing less, by any means or device whatsoever.

Central of Ga. Ry. v. Birmingham Sand & Brick Co., 9 Ala. App. 419, 425, 64 So. 202, 204 (1913); *see* New York Cent. R.R. v. Philadelphia & Reading Coal & Iron Co., 286 Ill. 267, 269, 121 N.E. 581, 582 (1919) (quoting *id.*).

5 A.2d 353, *cert. denied*, 308 U.S. 567 (1939); *cf. Portland Flouring Mills Co. v. British & Foreign Marine Insurance Co.*, 130 F. 860 (9th Cir.), *cert. denied*, 195 U.S 629 (1904) (parol evidence inadmissible to vary terms of bill of lading). The applicable rule was expounded by Judge Pound of the Court of Appeals of New York in 1922:

> The consignor is ordinarily liable for freight charges. He requires the carrier to perform the service when he delivers the goods for transportation, and thereby obligates himself to pay therefor. The usual stipulation in the bill of lading that the consignee shall pay the freight imposes no obligation on the carrier to insist on payment of freight before delivery to the consignee. It is not a part of the contract between consignor and carrier that the latter shall collect its bill of the consignee. The carrier may neglect to collect of the consignee and collect of the consignor.

New York Central Railroad v. Warren Ross Lumber Co., 234 N.Y. 261, 264, 137 N.E. 324, 324 (C.A.N.Y. 1922) (citing cases).

The following year, the same court explained the rule further, relating it to the anti-discriminatory purpose of the Interstate Commerce Act:

> The railroad company may demand the [freight charge] from the consignee, or it may collect from the consignor. It cannot make an election nor be held to an estoppel without violating the purpose and spirit of the Interstate Commerce Commission Act . . . . In order to prevent preferences, it is obliged to collect its freight charges, and if it cannot get them from one party it must look to the other. Delivery of the goods without collection is no release or waiver of any or either party.

New York Central Railroad v. Federal Sugar Refining Co., 235 N.Y. 182, 182-83, 139 N.E. 234, 235 (C.A.N.Y.

1923). As the Supreme Court of Alabama observed in 1929, it has long been "well settled" that,

> though the goods are only to be delivered upon payment by the consignee of the freight charges, the shipper is not relieved on account of a delivery by the carrier of the goods to the consignee without collecting the charges, though credit is voluntarily extended to the consignee. This right to collect from the consignor can only be barred by limitations or contract. Bankruptcy of the consignee does not relieve the shipper.

Moss Lumber Co. v. Michigan Central Railroad, 219 Ala. 593, 594, 123 So. 90, 90 (1929). *See also Pennsylvania Railroad v. Marcelletti*, 256 Mich. 411, 413-14, 240 N.W. 4, 4 (1932); *New York Central Railroad v. James B. Berry Sons' Co.*, 12 A.2d 588, 591 (Pa.), *cert. denied*, 311 U.S. 671 (1940).

For similar reasons, courts have consistently held that a carrier's misstatement of the applicable tariff rate does not—indeed cannot—estop it from collecting the lawful freight charge. *See, e.g., Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Fink*, 250 U.S. 577, 581-83 (1919); *Louisville & Nashville Railroad v. Maxwell*, 237 U.S. 94, 97 (1915); *Illinois Central Gulf Railroad v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978); *Atchison, Topeka and Santa Fe Railway v. Bouziden*, 307 F.2d 230, 234-35 (10th Cir. 1962). As the Court said in *Pittsburgh Railway*, "Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute." 250 U.S. at 583.

Certainty of payment and uniformity of rates are cornerstones of the Interstate Commerce Act. Judicially created affirmative defenses such as the one adopted below introduce elements of subjectivity and uncertainty that can only result in increased litigation and conflicts in the decisions of the lower courts. If recourse against

the consignor can be defeated by events occurring after a shipment has been transported, then carriers may be obliged to eliminate, or at least sharply curtail, extensions of credit to shippers. Such a change in present practice would hinder the free flow of commerce and radically alter the existing credit system. At the same time, if the liability of the consignor is made to turn upon *ad hoc* judgments concerning the "equities" of each case, opportunities for favoritism will proliferate. Moreover, shippers will be encouraged to contest their freight bills on equitable grounds, rather than paying them promptly as the credit regulations require. The ultimate effect will be to lower railroad revenues, in direct contravention of the policy Congress adopted in the Staggers Rail Act of 1980 to increase railroad revenues and strengthen the rail industry's ailing finances. *See* Pub L. No. 96-448, §§ 2, 3, 101(a), 94 Stat. 1895, 1896-97 (1980).[12]

As this Court stated only last Term, "The comprehensive character of [a] remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Northwest Airlines, Inc. v. Transport Workers Union of America*, 101 S. Ct. 1571, 1571-82 (1981) (footnote omitted). By the same token,

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[12] In the findings accompanying the Staggers Act, Congress noted that "earnings by the railroad industry are the lowest of any transportation mode" and that "by 1985, there will be a capital shortfall within the railroad industry of between $16,000,000,000 and $20,000,000,000." *Id.* § 2(6), (7). To alleviate this financial crisis, Congress partially deregulated railroad rates, making it the national policy "to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission." *Id.* § 101(a)(3). As the Committee on Conference reported, "The overall purpose of the Act is to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4110, 4111.

where an administrative agency, exercising authority specifically delegated by Congress, has established a comprehensive and detailed regulatory system governing the rights and liabilities of the parties to a uniform bill of lading contract, courts should not be permitted to nullify those rights and liabilities on the basis of implied equitable defenses. Accordingly, this Court should hold that, at least as to consignors who fail to protect themselves in accordance with the bill of lading, no judicially created affirmative defenses should be recognized.

II. THE "CREDIT VIOLATION" DEFENSE ADOPTED BY THE COURT BELOW IS UNWARRANTED

Quite apart from the fact that the decision below conflicts with the well-settled rules regarding the rights and liabilities of parties to a bill of lading contract, the lower court's implication of an affirmative defense from the ICC's credit regulations is unsupported by the language, purpose and history of those regulations. Judicial embellishment of a comprehensive statutory and regulatory scheme is strongly disfavored. *See, e.g., Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 570-74 (1979). Where Congress has provided specific sanctions for violations of a statutory command, courts should rarely create additional remedies not contemplated by Congress or the responsible administrative agency. *See Kelly v. Kosuga*, 358 U.S. 516, 519 (1959); *A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 42-43 (1941); *D. R. Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U.S. 165, 174-75 (1915); *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494, 509 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980).[13] Indeed, except where an

[13] The Court has recently emphasized that the critical factor in deciding whether to imply a private right of action from a federal statute is legislative intent. *See* California v. Sierra Club, 101 S. Ct. 1775, 1779 (1981). In particular, the Court will look to whether the party invoking the implied remedy was

implied remedy is "essential to effectuating the public policy embodied in [the statute]," *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961), or necessary to prevent the court from "enforcing the precise conduct made unlawful by the Act," *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959), a defense which has the effect of nullifying a lawful contractual obligation should not be implied. *See Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 750-57 (1947).

Here, where the statute and regulations existed for more than half a century without any court or agency suggesting that they created an affirmative defense to a freight charge action, it can hardly be said that such a defense is "essential" to effectuating the purpose of the statute. Indeed, the legislative and administrative history of the regulations demonstrates that the primary purpose of the rules was to protect carriers against depletion of their working capital, not to provide a windfall to consignors.

Moreover, sound policy reasons exist for rejecting this defense. Not only does it impose a capricious and potentially disproportionate penalty on a carrier for violations of highly technical credit regulations, but it also threatens to interfere with the existing credit system by encouraging carriers to require payment of all freight charges in advance of delivery. Thus, whatever the status of other equitable defenses under the statutory scheme, it is clear that there is no justification for an affirmative defense based on violation of the credit regulations.

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an intended beneficiary of the statutory command, whether there is evidence of congressional intent to create such a remedy, and whether the remedy is consistent with the purpose of the legislative scheme. *Id.* at 1778-81; Cort v. Ash, 422 U.S. 66, 78 (1975).

A. The Statute and Regulations Are Silent on the Subject of an Affirmative Defense

The Interstate Commerce Commission has not only specified the terms of the basic contract between the carrier and the consignor, but has also provided detailed regulations governing credit transactions between carriers and shippers. Despite the comprehensiveness of the regulatory scheme, neither the statutory provision under which these regulations were promulgated nor the regulations themselves contain any hint that a violation of the credit rules would preclude the carrier from collecting the lawful freight charge.

Section 3(2) of the Interstate Commerce Act, 49 U.S.C. § 3(2) (1976), subsequently recodified at 49 U.S.C. § 10743 (Supp. III 1979), provides in pertinent part:

> No carrier by railroad . . . shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . .

The Commission's regulations similarly contain no reference to the defense adopted below. They permit a railroad, "upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified," to extend credit for up to five days. 49 C.F.R. § 1320.1 (1980).[14] If the carrier fails

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[14] The Interstate Commerce Act, as it existed at the time this case arose, also contained provisions requiring motor carriers and water carriers to collect freight charges prior to delivery except as permitted under credit regulations promulgated by the Interstate Commerce Commission. These statutory provisions were virtually identically worded, *compare* 49 U.S.C. § 3(2) (1976) (rail carrier) *with* 49 U.S.C. § 323 (1976) (motor carrier) *and* 49 U.S.C. § 918 (1976) (water carrier), Pet. App. at 25a to 32a, and in fact have since been recodified in one provision, 49 U.S.C. § 10743

to collect the proper amount in the first instance, the carrier may extend credit for up to 30 days for payment of the balance due. *Id.* § 1320.5. The regulations also specify the time in which freight bills must be presented, *id.* § 1320.10, and the proper methods of presentation and collection, *id.* §§ 1320.11-13.

Because this statute and the detailed regulations issued under it do not refer to any affirmative defense to freight charge actions, the ICC has taken the position that a violation of the statute does not preclude collections by the carrier. In 1976 the Commission declared that "a violation of section 3(2) . . . in itself, would have . . . no effect" on a consignor's liability under the bill of lading. *C-G-F Grain Co. v. Atchison, Topeka and Santa Fe Railway*, 351 I.C.C. 710, 712 (1976). In *C-G-F*, the carrier was seeking to collect the balance of a freight charge from the consignor, even though the consignor had executed the non-recourse clause of the bill of lading. On the consignor's complaint, the Commission held that the question of the consignor's liability was one for the courts, since it depended solely on the bill of lading and not on any statute administered by the ICC. Although section 3(2) "prohibits a rail carrier from delivering freight without collecting all charges thereon," the Commission said, ". . . it contains no provision shielding a consignor from liability for lawful charges. Thus, a violation of section 3(2) by defendant, in itself, would have had no effect on complainant's responsibility for

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(Supp. III 1979). Similarly, the regulations under these provisions, while they differ in certain particulars such as the number of days permitted for collection of credit accounts, follow essentially the same pattern. *Compare* 49 C.F.R. § 1320.1 (1980) (rail carrier) *with* 49 C.F.R. § 1322.1(a) (1980) (motor carrier) *and* 49 C.F.R. § 1323.1 (1980) (water carrier), Pet. App. at 27a to 32a. Because of this similarity, courts have generally treated cases construing these provisions interchangeably. *See, e.g.*, Consolidated Freightways Corp. of Del. v. Eddy, 266 Ore. 385, 390, 513 P.2d 1161, 1163 (1973) (rail carrier cases "apposite" to case involving "nearly identical" motor carrier statute and regulations).

payment of undercharges." *Id.* Accordingly, the Commission concluded, "[t]he question of complainant's liability does not turn on whether any provision of the act has been violated." *Id.*

As this Court recently observed, the "caution [that] must temper judicial creativity in the face of legislative or regulatory silence . . . requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Here, the absence of any provision for an affirmative defense in the credit regulations can be viewed as an administrative construction of the statute which is entitled to great weight in determining congressional intent. *See, e.g., Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). Moreover, the agency has recently disavowed any intention to have its regulations create such a defense. The inference is thus strong that the silence of the statute is "not . . . the result of lack of prescience," but rather represents a "considered abstention" by Congress and the ICC. *Ford Motor*, 444 U.S. at 565.

B. The "Credit Violation" Defense is Not Supported By Precedent or Legislative History

Despite the absence of any reference to an estoppel defense in either the statute or regulations, the court of appeals concluded that Southern Pacific's failure to comply fully with these regulations constituted an absolute defense to its action to collect the freight charge. The court did not explain why such a defense was necessary or desirable, or even what the court's authority for creating such a defense might be. Instead, it relied entirely upon the decision of a divided panel of the Seventh Circuit in *Consolidated Freightways Corp. of Delaware v. Admrial Corp.*, 442 F.2d 56 (7th Cir. 1971). *See* 641 F.2d at 237, J.A. 30.

In *Admiral*, the defendant was a consignee to whom goods were delivered under bills of lading marked "prepaid." In reliance upon the carrier's explicit representation that the carrier had been paid by the consignor, Admiral paid over the amount of the freight charges to the consignor. In fact, the carrier had extended credit to the consignor, and had failed to collect the charges within the period allowed by the applicable credit regulations. After the consignor went out of business, the carrier turned to Admiral, as consignee, to pay the uncollected freight charges. The Seventh Circuit, noting that the carrier's "representations . . . deprived Admiral of its ability to protect itself from possible double liability," held the carrier estopped because of its "participation in securing Admiral's detrimental reliance." 442 F.2d at 59.[15]

Far from being, as the court below described it, "closely analogous" to the present case, *see* 641 F.2d at 237, J.A. 30, *Admiral* is plainly distinguishable. In the present case there were no representations by any of the

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[15] A substantial number of courts have reached exactly the opposite conclusion, relying on this Court's frequent statements to the effect that "equitable considerations may not serve to justify failure of [the] carrier to collect, or retention by [the] shipper of, any part of lawful tariff charges," Baldwin v. Scott County Milling Co., 307 U.S. 478, 485 (1939). These courts have refused to recognize an equitable defense even where, as in *Admiral*, a threat of double payment was posed. *See, e.g.*, Bartlett-Collins Co. v. Surinam Navigation Co., 381 F.2d 546 (10th Cir. 1967); Western & Atl. R.R. v. Underwood, 281 F. 891 (N.D. Ga. 1922); Great No. Ry. v. Hyder, 279 F. 783 (W.D. Wash. 1922); Southern Pac. Co. v. Wheaton Brass Works, 5 N.J. 594, 76 A.2d 890 (1950), *cert. denied*, 341 U.S. 904 (1951); Atlantic Coast Line R.R. v. West Paving Co., 228 N.C. 94, 44 S.E.2d 523 (1947); Atlantic Coast Line R.R. v. Wannamaker Chem. Co., 216 S.C. 226, 57 S.E.2d 311 (1950); Union Pac. R.R. v. Eyres Transfer and Warehouse Co., 12 Wash. 2d 282, 121 P.2d 340 (1942); Norfolk & W. Ry. v. Williamson Grocery Co., 103 W. Va. 532, 138 S.E. 102 (1927); Chicago & N. W. Ry. v. J.I. Case Plow Works, 173 Wis. 237, 180 N.W. 846 (1921).

carriers upon which Commercial Metals could rely, nor was there any possibility of double payment by Commercial Metals. In fact, none of the usual elements of an equitable estoppel were present.[16] Most importantly, as a consignor, Commercial Metals had ample opportunity to protect itself against any unforeseen liability by executing the non-recourse clause of the bill of lading. The consignee in *Admiral* had no such opportunity.

Indeed, the only similarity between this case and *Admiral* arises from dictum in *Admiral* suggesting that the carrier's violations of the credit regulations in that case offered "additional grounds for intervention of the principles of equity." 442 F.2d at 60. The carrier's credit practices, the court stated, "created the risk of loss" and "contributed to the gravity of the loss" by permitting the consignor's debts to accumulate. *Id.* The *Admiral* court did not purport to rest its decision solely upon this ground, nor to create an absolute defense releasing shippers from primary liability whenever violation of the credit regulations can be shown. Nonetheless, the court below, without further analysis, applied *Admiral* to achieve just such an inflexible and arbitrary result.

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[16] Under the classic definition of equitable estoppel, there must be (1) conduct—acts, language or silence—amounting to a misrepresentation; (2) intent on the part of the party to be estopped that his conduct should be relied upon, or at least the appearance of such intent; and (3) justifiable and detrimental reliance by the party pleading estoppel. *See* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 233-35 (1959); Leather Manufacturers' Bank v. Morgan, 117 U.S. 96, 108-09 (1886); 3 J. Pomeroy, A Treatise on Equity Jurisprudence § 805 (5th ed. 1941); *cf.* American Red Ball Transit Co. v. McCarthy, 114 N.H. 514, 517, 323 A.2d 897, 899 (1974), *cert. denied*, 420 U.S. 930 (1975).

Here, no representations were made by Southern Pacific (or Penn Central) to Commercial Metals that any other party had paid the freight charges, nor did Commercial Metals change its position in reliance on any conduct or statement of the railroads. Thus, the grounds for an equitable estoppel that were said to be present in *Admiral* are entirely lacking here.

In so doing, the Fifth Circuit ignored the substantial weight of authority, both before and after *Admiral*, holding that credit violations do not estop a carrier from collecting the freight charge from a party primarily liable therefor. *E.g.*, *Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546 (10th Cir. 1967); *Consolidated Rail Corp. v. Containair Systems Corp.*, No. 80-6814 (S.D.N.Y. August 31, 1981) (Pet. App. at 33a); *Arizona Feeds v. Southern Pacific Transportation Co.*, 21 Ariz. App. 346, 519 P.2d 199 (1974); *American Red Ball Transit Co. v. McCarthy*, 114 N.H. 514, 323 A.2d 897 (1974), *cert. denied*, 420 U.S. 930 (1975); *AAA Trucking Corp. v. Spherex, Inc.*, 110 N.H. 472, 272 A.2d 594 (1970); *Consolidated Freightways Corp. of Delaware v. Eddy*, 266 Ore. 385, 513 P.2d 1161 (1973) (en banc); *East Texas Motor Freight Lines v. Franklin County Distilling Co.*, 184 S.W.2d 505 (Tex. Civ. App.—El Paso 1944, no writ); *Western Maryland Railway v. Cross*, 96 W.Va. 666, 123 S.E. 572 (1924).

Perhaps more significantly, the Fifth Circuit entirely disregarded the legislative and administrative history of the credit regulations, which plainly indicates that the intent of the rules was to protect, not to penalize, railroads and other carriers. The sudden transformation of these rules—more than half a century after they were adopted—into a device by which shippers can avoid liability for lawful freight charges misinterprets their purposes and threatens substantial disruption of present credit practices.

Prior to 1918, the extension of credit by rail carriers was not regulated by the federal government. As a result, there was little uniformity in credit practices, and considerable pressure from shippers to obtain favorable credit terms at the expense of the carriers. In fact, the carriers estimated that as much as $75 million in working capital was tied up in unpaid transportation charges under the practices in effect prior to 1918. *See In re Section 3 of the Interstate Commerce Act, Ex Parte No. 73*, 57 I.C.C. 591, 594 (1920).

During World War I, the Director General of Railroads issued General Order No. 25, which cancelled all existing credit arrangements and put the collection of freight charges on a "cash basis." *Id.* at 593. In practice, this order was interpreted as permitting the carrier to present a freight bill to the shipper simultaneously with or just after delivery for payment in the regular course of business. Circular No. 9, *cited at* 57 I.C.C. at 593-94. Credit could be extended for an additional 48 hours only under certain described circumstances. *Id.*

The benefits of General Order No. 25, according to a later account by the ICC, included a substantial reduction in the amount of money outstanding in carriers' freight bill accounts, savings in labor at stations and elsewhere, the avoidance of discrimination between shippers, and a reduced risk of loss through bankruptcies and otherwise. *Payment of Rates and Charges of Motor Carriers, Ex Parte No. MC-1*, 2 M.C.C. 365, 374 (1937). The order was so successful that when Congress decided to return the railroads to private control, it carried General Order No. 25 over into the Transportation Act of 1920, Pub. L. No. 66-152, § 405, 41 Stat. 479 (amending section 3 of the Interstate Commerce Act).[17]

The key provision of the regulations adopted by the ICC under section 3(2)—which has remained largely unchanged to the present time—stated that:

> Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facil-

[17] In describing the effect of section 405, the Conference Committee stated: "The . . . provision virtually continues the operation of general order No. 25 of the Railroad Administration as supplemented, relating to the extension of credit by railroads." Report of the Committee on Conference, H.R. Rep. No. 650, 66th Cong., 2d Sess. 63 (1920), *reprinted in* III B. Schwartz, The Economic Regulation of Business and Industry 1628, 1640 (1973).

> ities, the carrier, upon taking precautions *deemed by it to be sufficient* to insure payment of the tariff charges within the period of credit herein specified, may relinquish possession of the freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons being herein called shippers, for a period of ninety-six hours . . . .

In re section 3 of the Interstate Commerce Act, Ex Parte No. 73, 57 I.C.C. 591, 597 (1920) (emphasis added). As the language suggests, the purpose of this regulation was to permit the railroads to extend limited credit, on a nondiscriminatory basis, while continuing in effect the protection afforded by General Order No. 25 against shippers' demands for excessive periods of free credit.[18]

From 1920, when the regulations were issued, to 1971, when the *Admiral* case was decided, no court ever suggested that a violation of the credit regulations would preclude the carrier from collecting the freight charge from a party with primary liability. On the contrary, judicial decisions roughly contemporaneous with the promulgation of the credit regulations rejected an estoppel defense as inconsistent with the purpose of the regulations themselves.

For example, in 1924, shortly after the rail credit regulations went into effect, the Supreme Court of Appeals of West Virginia was presented with the precise issue raised in this case. A consignor who had not executed the non-recourse provision of the uniform bill of lading sought to escape liability on the ground that the railroad had delivered the goods to the consignee without collecting the freight charge as required by § 3(2) of

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[18] Statutes patterned after section 3(2) were enacted for motor carriers in 1935, Pub. L. No. 74-255, 49 Stat. 565, § 223, 49 U.S.C. § 323 (1976), and for water carriers in 1940, Pub. L. No. 76-785, 54 Stat. 949, § 318, 49 U.S.C. § 918 (1976).

the Act. The court refused to recognize this defense, observing that it would defeat the anti-discriminatory purpose of the Act to permit "the carrier by the commission of an unlawful act to estop itself from collecting lawful charges from a consignor, thus rebating charges properly accrued." *Western Maryland Railway v. Cross*, 96 W. Va. 666, 673, 123 S.E. 572, 575 (1924). The credit statute, the court said, did not change "either the spirit of the statute or the consignor's liability." *Id.*

One year later, in *Chicago Junction Railway v. Duluth Log Co.*, 161 Minn. 466, 202 N.W. 24 (1925), where the consignor of a freight shipment also sought to avoid liability for the freight charge under section 3(2), the Supreme Court of Minnesota confirmed that the credit rules were not intended to release shippers from liability for freight charges. After discussing the history of General Order No. 25, the Minnesota court concluded:

> The amendment [section 3(2)] was not intended by Congress to put the liability for freight charges solely upon the consignee nor to relieve the consignor from primary liability. The statute had in view something quite different. It wanted to prevent discrimination. This was the purpose of the act amended. It wanted, also, to prevent the capital of the carriers from standing in the form of unpaid charges for transportation and therefore not working capital. Whether the shipper or consignee should pay the freight did not interest it. The Transportation Act did not relieve the consignor from liability for tariff charges.

202 N.W. at 25.

Similarly, the Court of Civil Appeals of Texas held in 1944 that the section of the Act relating to motor carrier extensions of credit, then recently enacted, had no effect on a consignor's liability to pay the freight charges:

> The Federal Statute forbidding delivery without payment of the freight by the consignee is not intended in any way to affect the contract between consignor and carrier. The consignor would have no right to compel the carrier to deliver without payment of the freight by the consignee. By complying with the law, it may relieve itself from liability for the payment of the freight. Should this be done, it is immaterial to consignor whether the carrier does or does not collect from the consignee. The exaction of freight charges from the consignee before delivery is not intended for the benefit of the consignor, but it is made the duty of the carrier for the protection of the carrier.

East Texas Motor Freight Lines v. Franklin County Distilling Co., 184 S.W.2d 505, 507 (Tex. Civ. App.—El Paso 1944, no writ). *See also American Red Ball Transit Co. v. McCarthy*, 114 N.H. 514, 517, 323 A.2d 897, 899 (1974), *cert denied*, 420 U.S. 930 (1975); *Consolidated Freightways Corp. of Delaware v. Eddy*, 266 Ore. 385, 396, 513 P.2d 1161, 1166 (1973); *Arizona Feeds v. Southern Pacific Transportation Co.*, 21 Ariz. App. 346, 354, 519 P.2d 199, 207 (1974).

The court below, disregarding Justice Holmes' observation that "the practical construction given to [a] law for nearly half a century is strong evidence" of the law's meaning, *Wright v. Central of Georgia Railway*, 236 U.S. 674, 678 (1915), overturned the longstanding construction of the credit regulations without even citing—much less distinguishing—any of the contrary precedents. Despite the absence of any support for its position in the statute, the regulations, or the legislative history, the court implied from the regulations an affirmative defense which the agency that promulgated the rules had already declared to be nonexistent. Given the respect due "the interpretation given [a] statute by the officers or agency charged with its administration," *Zenith Radio Corp.*, 437 U.S. at 450, this unsupported departure from the long-settled construction of the credit provisions should not be allowed to stand.

C. Sound Reasons of Policy Support Denial of the "Credit Violation" Defense

The ICC's credit regulations are highly technical and, in many respects, difficult to obey. Thousands of rail cars are delivered every day by railroads all across the country. Inevitably, some cars are delivered to non-credit patrons, some freight bills are sent out late, and some accounts are not collected on time.[19] Violations of the regulations typically do not involve intentional favoritism by a carrier; indeed, the ICC has made a specific finding that "shippers are the major cause of violations" of the rules. *Regulations for Payment of Rates and Charges, Ex Parte No. 73*, 326 I.C.C. 483, 487 (1966).[20]

In 1980, the ICC proposed repealing the credit regulations altogether, noting that "the apparent, widespread noncompliance with the regulations indicates that the payment periods and other time limits prescribed are simply not realistic for many of the situations in which

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[19] Indeed, a 1966 study by the ICC's Bureau of Enforcement found that almost a third of 15,751 freight bills examined were overdue, and nearly half of those were more than 10 days overdue. Regulations for Payment of Rates and Charges, Ex Parte No. 73, 326 I.C.C. 483, 485 (1966). Although the methodology of this study was questioned by the railroads, the railroads' own figures showed that of 445,984 collectible items accrued during the period of the investigation, 10,202 (or about 2.24 per cent) involved credit violations. *Id.* at 486.

[20] In 1975, the Commission was urged to alleviate the recurrent problem of shipper nonpayment by providing that shippers as well as carriers could be penalized for violations of the credit rules. After a lengthy study, however, the ICC concluded that the Interstate Commerce Act did not give it jurisdiction to regulate shippers in this manner. Regulations for Payment of Rates and Charges, Ex Parte No. 73, 350 I.C.C. 527, 541 (1975). As a result, as the ICC acknowledges, the regulations place all the burden on the carrier to ensure compliance with the regulations.

The 1975 proceeding did result in certain alterations in the credit regulations, including a uniform credit period for rail and motor carriers, but these were withdrawn for further study before being implemented. Provisions for Payment of Rates and Charges, 42 Fed. Reg. 22369 (1977).

they apply." *Ex Parte Nos. MC-1, 73, 143, and 170*, 45 Fed. Reg. 31766 (1980). Moreover, the Commission said, "there is a serious question as to whether the regulations . . . contribute to the statutory goal of preventing discrimination." *Id.* In place of the existing regulations, the Commission proposed to let each carrier regulate its own credit practices on a non-discriminatory tariff basis. This proposal has been pending before the Commission without action for almost two years.

The court below thus implied an additional, draconian remedy to penalize railroads for violations of the credit regulations just as the agency responsible for those regulations was pronouncing them unrealistic. This Court has recognized that judicial implication of the particular type of remedy adopted here—an affirmative defense rendering a contractual obligation unenforceable—can lead to highly capricious and disproportionate results. *Kelly v. Kosuga*, 358 U.S. 516, 520-21 (1959); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 753-54 (1947). The prospect raised for the railroads and other carriers is that all violations of the credit rules—even unavoidable ones—will be transformed by the Fifth Circuit and other courts into a barrier to recovery of lawful freight charges. To avoid serious revenue losses, the carriers may be forced to curtail the granting of credit altogether, thus penalizing those shippers who currently pay their bills in a responsible manner. *See id.* at 753.

The credit violation defense is not needed to encourage compliance with the credit rules. Very real economic incentives compel railroads to collect their charges from the consignee to the extent it is possible to do so. Violations of the regulations can only result, as here, in substantial delay in obtaining payment, as well as the expense of possible litigation.

Moreover, the ICC has ample authority to police those credit practices, which, in the agency's view, warrant deterrence. This authority includes the power to issue cease and desist orders, *Shaw Warehouse Co. v. Southern Railway*, 308 I.C.C. 609, 633-34, 637 (1959), the power

to bring injunctive suits requiring carriers to comply with the regulations, *Interstate Commerce Commission v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974), and the power to invoke civil forfeitures of $5,000 per violation under 49 U.S.C. § 11901(a) (Supp. III 1979) for knowing violations of the credit regulations, *United States v. Western Pacific Railroad*, 385 F.2d 161 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *United States v. Pennsylvania Railroad*, 308 F. Supp. 293 (E.D. Pa. 1969). As these cases demonstrate, the question whether a violation has occurred will often involve a factual inquiry regarding the intent of the carrier. *E.g.*, *United States v. Western Pacific Railroad*, 385 F.2d at 163. *See also United States v. Southern Railway*, No. 78-0519, slip op. at 6-7 (D.D.C. May 15, 1980) (unpublished). In exercising its discretion whether to apply these penalties, the Commission can and should take into account the presence or absence of discriminatory purpose, the degree of notice to the carrier that particular practices might violate the regulations, the degree of fault of the shipper, and the effect of enforcement on existing, permissible credit practices. A court applying the inflexible "credit violation" defense adopted below would have no occasion to consider these factors, nor would it have the expertise properly to assess their weight in a particular case.

The facts of this case illustrate the problems that can arise when courts venture to create federal common law in this highly technical field. Southern Pacific has been denied recovery of the freight charge not only on the first car, which was delivered without advance payment, but also on the two cars for which Southern Pacific demanded payment by checks before delivery.[21] Yet acceptance of a check has long been in accepted commercial prac-

[21] The freight charge on one of these two cars was paid in full by check in advance of delivery. A check for the other shipment was inadvertently accepted even though the initial digits were transposed ($2,383.67 rather than $3,283.66). Freight bills for the correct amounts were mailed to Carco within four days of

tice in the industry. *See Fullerton Lumber Co. v. Chicago, Milwaukee, St. Paul & Pacific Railroad*, 282 U.S. 520, 522 (1931). The courts below gave no reason why Southern Pacific should be estopped to collect the freight charge on these two cars. Indeed, it is not clear why Southern Pacific's insistence on receiving payment by check before releasing the cars did not constitute full compliance with the ICC regulations, which simply require the railroad to take "precautions deemed by it to be sufficient to assure payment of the tariff charges . . . ." 49 C.F.R. § 1320.1 (1980).

Respondent's theory appears to be that Southern Pacific should have held up delivery of the second and third cars until Carco had paid the outstanding freight charge on the first car. *See* Respondent's Brief in Opposition to Petition for Writ of Certiorari at 2-3. But Southern Pacific had no legal right to withhold delivery of one car to enforce collection of the freight charge on another car; the carrier's lien covers only the goods in the immediate shipment. *See* 49 U.S.C. §§ 88, 105 (1976); *Atlas S.S. Co. v. Colombian Land Co.*, 102 F. 358, 361 (1900); *cf.* U.C.C. § 7-307. Once Carco offered to pay the freight charges on the second and third cars, Southern Pacific could not have withheld delivery without risking liability to Carco for conversion of its goods. *See Atchison, Topeka and Santa Fe Railway v. Tulsa Rig, Reel & Manufacturing Co.*, 99 Okla. 40, 225 P. 696 (1923).

Obviously, therefore, the lower court's ruling denying Southern Pacific recovery of the freight charges on the second and third cars was erroneous, since there was no violation of the regulations as to those shipments.[22] More to the point, however, the lower court's decision reflects the inconsistencies and conflicts likely to result

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delivery. *See* 49 C.F.R. § 1320.5 (1980) (governing balance due bills in the event of undercharges).

[22] Southern Pacific should thus be entitled to recover the $9,045.45 in freight charges on the second and third cars, regardless of the rule applied.

when technical regulations such as these, intended to be administered only by the agency that promulgated them, are taken over by the courts and put to a new and different purpose. The only way to preserve uniformity and balance in the interpretation of these rules is to restrict their enforcement to the remedies prescribed by statute and to the agency entrusted with their administration. As this Court stated last Term in rejecting another judicially created remedy:

> There is nothing in the statute itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted.

Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061, 2069 (1981).

CONCLUSION

Because the lower court erred in permitting respondent, which was primarily liable under the terms of the bill of lading, to assert an affirmative defense based on a violation of the credit regulations, the judgment below should be reversed, and the case remanded with instructions to the district court to enter judgment for the petitioner.

Respectfully submitted,

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Appendix

APPENDIX

Section 3(2) of the Interstate Commerce Act, 49 U.S.C. § 3(2) (1976), prior to recodification in 1978, provided as follows:

> (2) Payment of freight as prerequisite to delivery
>
> No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be construed to prohibit any carrier or express company from extending credit in connection with rates and charges on freight or express shipments transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address

of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this title or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within the period provided in paragraph (3) of section 16 of this title. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this title or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within the period provided in paragraph (3) of section 16 of this title. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges, and an action for the enforcement of his liability may be begun within the same period provided in the case of an action against a consignee who has given erroneous information as to the beneficial owner.

Sections 1320.1 through 1320.17 of the regulations of the Interstate Commerce Commission, 49 C.F.R. §§ 1320.1-.17 (1980), provide as follows:

§ 1320.1 Carrier may extend credit to shipper.

The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 4 days (or 5 days where retention or possession of freight by the carrier until tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part. In regard to traffic of nonprofit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the carriers shall require such organizations to furnish the names of the beneficial owners of the property in the bills of lading or at least have the bills of lading incorporate by reference a document containing the names of the beneficial owners.

§§ 1320.2—1320.4 [Reserved]

§ 1320.5 Additional charges.

Where a carrier has relinquished possession of freight and collected the amount of tariff charges represented in a freight bill presented by it as the total amount of such charges, and another freight bill for additional charges is thereafter presented to the shipper, the carrier may extend credit in the amount of such additional charges for a period of

30 days, to be computed as set forth in this part, from the date of the presentation of the subsequently presented freight bill.

§ 1320.6 Icing charges.

Where icing charges are not published in the tariffs at fixed amounts determinable at the time the shipment moves from point of origin, and where freight charges are prepaid and icing charges are to be paid by the consignor, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period specified in this part, may relinquish possession of the freight in advance of the payment of the icing charges and may delay presentation of bills for such icing charges for a period not exceeding 15 days after the end of the calendar month during which the charges accrued and may extend credit in the amount of such charges for 15 days from the presentation of the bill for such charges.

§ 1320.7 Demurrage charges.

Where the amount of demurrage charges is determinable under average agreements made in accordance with tariff provisions, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period, may delay the presentation of bills for such demurrage charges for a period not to exceed 15 days from the expiration of the authorized demurrage period and may extend credit in the amount of the demurrage charges accruing during the demurrage period for 15 days from the presentation of the bill for such charges.

§ 1320.8 Periods of credit following delivery.

Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight,

the 4- and 5-day period of credit shall run from the first 12 o'clock midnight following the delivery of the freight.

§ 1320.9 Periods of credit following presentation of freight bill.

Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the 4- and 5-day periods of credit shall run from the first 12 o'clock midnight following the presentation of the freight bill.

§ 1320.10 Presentation of freight bills.

Every carrier shall present freight bills for all transportation charges except those specifically excepted in this part to shippers prior to the first 12 o'clock midnight following forwarding of prepaid shipments or delivery of collect shipments except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the billing point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available at the billing point of the carrier. A carrier shall not extend further credit to any shipper which fails to furnish sufficient information to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier. As used in this section the term "shipper" includes, but is not limited, to, freight forwarders as well as shippers' associations and shippers' agents within the meaning of section 402(c) of part IV of the Interstate Commerce Act.

§ 1320.11 Time of presentation when mailed.

Shippers may elect to have their freight bills presented by means of the United States mails, and

when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time.

§ 1320.12 Saturdays, Sundays, and legal holidays may be excluded from period.

In the computation of the various periods of credit Saturdays, Sundays, and legal holidays may be excluded, and where the time for presentation to shippers of freight bills for transportation and related charges falls on Saturday, Sunday or a legal holiday such bills may be presented prior to 12 o'clock midnight of the next succeeding regular work day.

§ 1320.13 Time of collection when payment is mailed.

The mailing by the shipper of valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of the rules in this part. In the case of dispute as to the time of mailing the post mark shall be accepted as showing such time.

§ 1320.14 [Reserved]

§ 1320.15 Computation of credit period for payment of export traffic rates.

The period fixed of 4 days for the payment of transportation rates and charges, insofar as applicable to export traffic which is loaded into vessels direct from railroad cars or piers or from such cars or piers by means of lighters, may be computed from the first 4 p.m. following the time when the

vessel is completely loaded, freight bills to be delivered to vessel owner or his representative not later than the day on which the loading of the vessel is completed.

§ 1320.16 Computation of credit period for payment of freight rates at interior California points not served by railroad.

The period of 4 days fixed for the payment of transportation rates and charges, insofar as applicable to freight from and to Bartle, Calif., when destined to or from interior points described in the report, in Siskiyou, Shasta, and Modoc Counties, Calif., not served by railroad, may be computed from the first 4 p.m. following 26 days after the mailing by petitioner of the freight bills for such traffic.

§ 1320.17 Interline settlement of revenues.

Nothing in this part shall be interpreted as affecting the interline settlement of revenues from traffic which is transported over through routes composed of lines of common carriers subject to parts I, II, or III of the Interstate Commerce Act.

Respondent's Brief

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No. 81-622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

v.

COMMERCIAL METALS CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly hold that Southern Pacific's violations of the Interstate Commerce Act and applicable rules and regulations promulgated by the Interstate Commerce Commission constitute a defense to Southern Pacific's claim?

   a. Does the holding of the Court of Appeals violate the anti-discriminatory provisions of the Interstate Commerce Act?

   b. Is the equitable position of the parties such that Southern Pacific should be allowed to recover a loss resulting from its own action in granting illegal credit preferences?

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The partially owned subsidiaries of Respondent are:

1. Commercial Metals de Mexico S.A. de C.V.
2. Eurintrade, S.A.
3. Pinto Island Metals Company, Inc.

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In The

Supreme Court of the United States

October Term, 1981

No. 81-622

Southern Pacific Transportation Co.,
Petitioner,

v.

Commercial Metals Co.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent, Commercial Metals Company (hereinafter called "Commercial"), is in the business of buying and selling steel goods. Petitioner, Southern Pacific Transportation Co. (hereinafter called "Southern Pacific"), is a common carrier by rail.

Commercial sold certain steel products to Carco Steel Corporation (hereinafter called "Carco"). Under the agreement between Commercial and Carco, Carco was to pay the cost of transporting the goods from Detroit, Michigan, to Alhambra, California. Hence, a rail carrier was engaged to transport the goods on a *freight collect* basis; i.e., the

carrier was to collect the freight charges from Carco upon delivery.

The steel goods were shipped by three rail cars at different times, two rail cars being shipped almost three weeks after the first car was shipped. (Stip. Nos. 14 and 19, J.A. p.16).[1] While Penn Central Transportation Company was the originating carrier, Southern Pacific acted as the delivering carrier. Since the shipment was freight collect, Southern Pacific was to collect the freight charges from Carco prior to relinquishing possessions of the goods. Carco was not a credit patron of Southern Pacific, and it never applied to Southern Pacific for any credit whatsoever. Southern Pacific had never made any deliveries to Carco before the delivery of the three subject rail cars. (Stip. Nos. 10 and 11, J.A. p.15).

The first rail car was released to Carco by Southern Pacific on April 25, 1974. Contrary to the terms of the freight collect bill of lading, Southern Pacific did not collect any freight charges. Furthermore, Southern Pacific *did not take any precautions* to insure timely payment. (Stip. Nos. 16 and 17, J.A. p.16).

At a time when the invoice for freight charges for the first load was in arrears, Southern Pacific released possession of the last two rail cars. The freight charges for the last two cars totalled $9,045.45. (Stip. No. 24, J.A. p.17). Nevertheless, Southern Pacific released the two cars to Carco for two checks totalling only $8,145.46, almost $900.00 less than the proper amount. (Stip. No. 21, J.A. p.17). The checks were dishonored and unpaid by Carco's bank. (Stip. Nos. 13 and 23, J.A. pp.16 and 17).

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[1]The case was tried on a stipulated record. A copy of the Stipulation of Facts appears in the Joint Appendix at 14-20. References to the Stipulation will be in the form "Stip. No. , J.A. p. ."

Hence, without taking any steps, whatsoever, to determine the creditworthiness of Carco, Southern Pacific granted it credit by relinquishing possession of the goods on the first rail car to Carco without obtaining payment. With respect to the last two carloads, Southern Pacific granted Carco additional credit by accepting two checks which were approximately $900.00 less than the full amount of the applicable freight charges. It is not surprising that the two checks were backed by insufficient funds.

Both the Court of Appeals and the trial court found that Southern Pacific's actions violated the Interstate Commerce Act (hereinafter called the "Act") and the credit regulations of the Interstate Commerce Commission (hereinafter called the "Commission"). It should also be noted that Southern Pacific's actions violated the express terms of section 7 of the contract between the parties.

It was not until two and one-half years later that Southern Pacific first notified Commercial that contrary to the contract, the goods had been released and the freight charges were unpaid. Commercial had sold the goods on a freight collect basis and naturally assumed that the charges had been paid. In the interim, Southern Pacific had filed suit against Carco; however, the ultimate disposition of that suit is unclear in the record.

Southern Pacific subsequently brought suit against Commercial for payment of the charges totalling $13,679.56. The trial court ruled that, "the loss sustained by [Southern Pacific] was due entirely to its own fault and negligence by failing to take the proper credit precautions when it delivered the goods to Carco." The trial court further concluded that, "it is fundamentally unfair and inequitable for [Commercial] in this case to pay for the *gross negligence* of [Southern Pacific]." (J.A. p.24) (Emphasis supplied). Hence, the trial court held that although Southern Pacific had established a *prima facie* case, Commercial "established

a valid, equitable, defense to the collection of the freight charges." (J.A. p.23).

Southern Pacific then appealed to the Court of Appeals. That court affirmed the take-nothing judgment of the trial court by holding that, "it would indeed be anomalous to allow Southern Pacific to recover despite its conduct." *Southern Pac. Trnsp. Co. v. Commercial Metals Co.*, 641 F.2d 235, 238 (5th Cir. 1981) (J.A. p.33). The appellate court concluded that, "we are compelled to hold that the carrier's failure to comply with the applicable ICC regulations is a defense, available to Commercial, in an action by the carrier for unpaid freight charges." *Id.* at 239 (J.A. p.34).

Southern Pacific filed a petition for rehearing *en banc*, but a majority of the judges in active service did not vote in favor of such *en banc* reconsideration. Southern Pacific also requested a rehearing by the panel which was also denied.

SUMMARY OF THE ARGUMENT

Southern Pacific granted illegal credit preferences to Carco by breaching the terms of the transportation contract between the parties and violating the express provisions of the Act and the Commission's regulations. Both courts below properly held that even though Southern Pacific had established a *prima facie* case, Commercial established an affirmative defense by showing that Southern Pacific negligently violated the mandates of the Act and the Commission's regulations.

The applicable regulations provide that a railroad can extend credit to a customer if, and only if, the railroad takes precautions to insure timely payment of the charges. This, Southern Pacific totally failed to do. Had it observed these simple, but mandatory rules, this loss would never have occurred.

Equitable defenses to freight charge claims began to develop in 1924. See, e.g., *Davis v. Akron Feed & Milling Co.*, 296 F. 675 (6th Cir. 1924). By 1976, a majority of the jurisdictions recognized the equitable defense to freight charge claims. It is with this background that both courts below held that Southern Pacific's violations constituted a defense to the claim against Commercial.

In deciding whether to employ a defense to a freight charge claim, the courts should establish the following test:

1. Determine if allowing the defense would be contrary to the anti-discriminatory policies of the Act. If not,

2. Analyze the equitable position of the parties.

In applying this test, it is clear that the recognition of a defense to Southern Pacific's claim does not contravene the anti-discriminatory policies of the Act. Such policies are involved when the question in a freight charge case is the *amount* of the freight charge. Discrimination is not involved when the question is whether a particular party is responsible for a freight charge. For this reason, the Act does not purport to determine which party to a freight transaction shall be responsible for the charges. In this case, the issue is not the amount to be charged for transportation services. Rather, the issue is which party will be liable for them. Hence, the anti-discriminatory policies of the Act are not involved.

The holdings of the courts below do not result in any favoritism being extended to Commercial. To the contrary, any unlawful actions involved in these shipments were committed by Southern Pacific. One of the purposes of the credit regulation is to prevent discrimination through the non-uniform extension of credit. Southern Pacific ille-

gally preferred Carco by granting it credit under circumstances prohibited by the regulations. Hence, it was Southern Pacific that was guilty of granting preferential credit terms, thus violating the Act. Southern Pacific should not be allowed to employ the very Act it violated to shift the losses caused by its violations onto Commercial.

Having determined that the anti-discriminatory policies of the Act do not apply in this case, it is appropriate to review the equitable positions of the parties. In doing so, it is apparent that the decisions of both courts below were correct.

Southern Pacific was in control of the circumstances surrounding the release of the goods to Carco. No avenue was open to Commercial to force Southern Pacific to comply with the Commission's credit regulations.

Commercial did not sign the non-recourse provision of the bills of lading. However, such omission did not violate any law or other obligation. On the other hand, Southern Pacific breached the terms of the transportation contract and blatantly violated the express terms of the Act and the Commission's regulations. Hence, Southern Pacific's actions and omissions were wrongful.

The current trend is to lessen the amount of governmental economic protection. Congress has expressed an intent that the marketplace and competition be the regulators. The railroads should not be afraid to have their actions reviewed under standards that govern all other segments of the economy. Traditional principles of common law and equity have not harmed this country's economy to date, and there is no reason to believe that it will do so in the future.

The public interest cannot be best served by permitting a railroad to recover a loss resulting from its own action in granting illegal credit preferences. Rather, the public

interest will be best served by adopting a rule which encourages railroads to follow the elementary business practice of checking creditworthiness of customers prior to extending credit to them. For these reasons, the opinions of the trial court and the Court of Appeals should be affirmed.

THE ARGUMENT

A. SOUTHERN PACIFIC'S VIOLATION OF INTERSTATE COMMERCE ACT AND TERMS OF CONTRACT

Southern Pacific not only violated the terms of the transportation contract between the parties, but it also violated express prohibitions of the Act. 49 U.S.C. § 3(2)[2] entitled, "Payment of Freight as Prerequisite to Delivery" provides as follows:

> No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . .

In other words, if a rail carrier delivers freight without receiving payment of the charges under circumstances not prescribed under the Commission's rules and regulations, the carrier has violated the Act.

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[2]Subsequent to the occurrence of the operative facts of this case, said statute was superseded by 49 U.S.C. 10743 (Supp. III 1979).

The Commission promulgated the following regulation found at 49 C.F.R. § 1320.1:

> The carrier, *upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified* in this part, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges . . . for a period of 4 days (or 5 days where retention or possession of freight by the carrier until tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part. (Emphasis supplied)

Section 7 of the transportation contract between the parties provides as follows:

> The owner or consignee shall pay the freight . . . and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. (J.A. pp. 37, 41).

Therefore, the contract between the parties demands that the carrier not release the goods before receiving payment of the freight charges, except under circumstances prescribed by law. The Act prohibits a carrier from relinquishing possession of goods before the freight charges are paid, except under circumstances prescribed by the Commission's regulations.

Under the Commission's regulations, a carrier, prior to extending credit, must take *at least some precautions* to assure timely payment of freight charges. Here, it is undisputed that Southern Pacific was to collect the charges from Carco. Carco was not a credit patron of Southern Pacific. Prior to the delivery of the three subject rail cars, Southern Pacific had never made deliveries to Carco. Carco never applied to Southern Pacific for any credit. It is undisputed that Southern Pacific delivered and relinquished the first carload of steel without ever investigating Carco's creditworthiness.

Both courts below held that under these circumstances, Southern Pacific's actions violated the Commission's regulations. How could it be argued otherwise? Despite the unambiguous provisions of the contract between the parties, Southern Pacific delivered the first load without payment and took no precautions, whatsoever, to assure timely payment. The regulation demands that at least some precaution be taken to assure timely payment. See *Consolidated Freightways Corp., etc. v. Bergan,* 586 P.2d 1053, 1058 (Idaho 1978); *Mason & Dixon Lines v. Crossville Rubber Products,* 414 F. Supp. 166, 167 (M.D. Tenn. 1976). Therefore, the mandate of the Commission was ignored.

Not only did Southern Pacific violate the regulations with respect to the first shipment, it compounded the error with respect to the last two rail cars. Southern Pacific mailed its invoice for the freight charges on the first carload on April 25, 1974. It delivered the last two cars to Carco on May 16, 1974. Giving Southern Pacific the benefit of the most liberal interpretation of the regulations defining the date on which the invoice for the first car became due, it would have been past due at least ten days to two weeks prior to Southern Pacific's release of the last two cars.

Notwithstanding that the charges on the first rail car were flagrantly delinquent and Southern Pacific thereby

had good reason to question Carco's creditworthiness, it accepted two checks for less than full payment of the last two cars. The checks were approximately $900.00 short of the proper amount, and were backed by insufficient funds. Again, the regulations were ignored.

In a belated attempt to explain its negligence, Southern Pacific asserts that its mistake in accepting the check in the wrong amount is the result of a transposition of numbers.[3] The proper amount for the check was $3,283.66; however, the check accepted was in the amount of $2,383.67. Commercial submits that such error was not a mere transposition of numbers but further evidence of Southern Pacific's careless credit practices. Nevertheless, the check was clearly in the wrong amount and should not have been accepted.

Notwithstanding the fact that Commercial did not execute the non-recourse provision, Southern Pacific's conduct still constitutes a violation of the Act, regulations, and contract. Southern Pacific now suggests for the first time that it relied on this fact when extending credit to Carco instead of taking the required precautions. No such reliance is reflected in the record. Additionally, not executing the non-recourse provision does not create a guaranty agreement. Southern Pacific merely asserts without authority that when the non-recourse provision is not signed, the carrier is relieved of all obligations. Contrary to Southern Pacific's position, the regulations require that the carrier take at least some precaution to check the creditworthiness whether or not the non-recourse provision is signed. Southern Pacific's position in this regard is further evidence of its negligence and failure to follow the mandate of the Act.

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[3]See Brief For Petitioner, p. 31, n. 21.

Southern Pacific's delivery of the last two cars, while ignoring the past due invoice for the first car and accepting less than full payment from a consignee whose creditworthiness had never been investigated, constituted a violation of the Commission's regulations and the Act. Not only was the Act violated, but Southern Pacific's conduct constituted a complete abrogation of its obligations under the contract. The trial court so held and the Court of Appeals affirmed such conclusion.

B. SOUTHERN PACIFIC'S VIOLATION OF ACT CONSTITUTES A DEFENSE TO ITS CLAIM

1. The Non-Recourse Provision.

Southern Pacific adamantly argues that since Commercial did not sign the "non-recourse" provisions of the bills of lading, it is liable for the freight charges.[4] It further argues that conduct of a carrier should not affect the terms of the bill of lading and the resulting liability. Southern Pacific's argument incorrectly analyzes this as being the controlling issue in this case.

Both the trial court and the Court of Appeals employed the correct method of analyzing the issues presented. Southern Pacific established a *prima facie* case against Commercial by proving that Commercial was a party to the transportation contract and did not execute the non-recourse provision. *O'Boyle Tank Lines, Inc. v. Beckham,* 616 F.2d 207, 209 (5th Cir. 1980); *Illinois Steel Co. v. B. & O. R. Co.,* 320 U.S. 508, 513, 64 S. Ct. 322, 325, 88 L.Ed. 259 (1944).

However, just because Southern Pacific established a *prima facie* case, Commercial is not prevented from establishing an affirmative defense to Southern Pacific's case.

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[4]See Brief For Petitioner, pp. 8-17.

The net result of Southern Pacific's position is that if a shipper does not sign the "non-recourse" provision, the carrier can never be responsible for the consequences of its violation of law or breach of contract. While such position is certainly advantageous to the ultimate collection of Southern Pacific's receivables, it places Southern Pacific in the unrealistic position of being incapable of doing any wrong. Under these conditions, carriers have no incentive to improve inefficient and careless credit practices.

This Court should not hold that Southern Pacific is immune from the consequences of its wrongful actions. The courts below properly held that the wrongs committed by Southern Pacific constituted a defense to its claim. In so holding, the trial court and the Court of Appeals joined in the current trend of cases adopting equitable defenses to freight charge cases. *In Re Penn-Dixie Steel Corp.*, 6 B.R. 817 (S.D. New York 1980).

2. Development of Equitable Defenses to Freight Charge Claims.

A proper analysis of this case requires a brief look at the evolution and historical context of equitable defenses to freight charge claims.[5] One classification of freight charge cases are those commonly called "undercharge" cases. *Pittsburgh, C.C. & St. L. Ry. Co. v. Fink,* 250 U.S. 577, 40 S. Ct. 27, 63 L.Ed. 1151 (1919) is a typical "undercharge" case. In that case, the rail carrier delivered certain goods to the consignee, the freight charge for which was $15.00. The consignee paid the charge. It was later discovered that the tariff rates filed with the Commission dictated that the charges should have been $30.00. Relying

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[5]For a thorough discussion of the evolution of equitable defenses to freight charge claims, see *Interstate Motor Freight System v. Wright Brok.*, 539 S.W.2d 764, 766 (Mo. App. 1976).

upon the mandate in the Act against the granting of preferences and practicing discrimination,[6] the Court held that the consignee was liable for the full sum fixed by the tariff. The court reasoned that in light of the Act, it is presumed that the consignee knows of the rate specified in the published tariff, and hence, impliedly agrees to pay such charge.

Shortly after the decision in *Fink,* a line of authorities began to develop recognizing equitable defenses to carrier's actions for freight charges in certain situations. The typical such situation involved an affirmative representation by the carrier that the charges had been prepaid. Such cases are normally referred to as "double payment" cases because collection by the carrier would create a double payment by a party to the transportation contract. The first case was *Davis v. Akron Feed & Milling Co.,* 296 F. 675 (6th Cir. 1924).

Beginning around 1955, more courts began to adopt an equitable defense to freight charge claims where the rail carrier misrepresented payment to the consignee. For example, in *Southern Pacific Company v. Valley Frosted Foods,* 116 A.2d 70, 71 (Super. Ct. Pa. 1955), it was held:

> The [carrier] alleges that while they have erred in forwarding the bill of lading marked 'to be prepaid' without actually having demanded prepayment or collected within the 96 hours grace period, and while this action has misled the defendant to his damage, nevertheless, they bring this action not so much because they want to, but because they must on the theory that the ICC rule against the granting of preferences is applicable to this situation. They come before the Court and say: 'We have made a mistake; we have made a contract with you; we have breached that contract; this breach has damaged you but you

[6] 49 U.S.C. § 6 (7) (1976) at the time of the operative facts herein.

> must pay again'. In fact, they come before the Court and say this is a case in which the equities of the matter cannot be considered. Any time a litigant appears before this or any other Court with such a proposition, they must be absolutely certain of two things. First, that there is a binding precedent which inhibits the Court from examining the equities of the case, and second, that the overpowering public policy requiring the strict application of the law is actually involved in the case.

The court ruled against the carrier by concluding that to do so would not violate the public policy against the granting of preferences. See also, *United States v. Mason & Dixon Lines,* 222 F.2d 646 (6th Cir. 1955).

Farrell Lines Inc. v. Titan Industrial Corp., 306 F. Supp. 1348 (S.D. New York 1969) was also a double payment case. The shipper engaged a forwarder to ship its goods. The forwarder apparently engaged the carrier which rendered its shipping services by transporting the goods from Baltimore to Africa. The shipper paid the freight charges to the forwarder who in turn was supposed to remit same to the carrier. The forwarder, however, went bankrupt and the carrier never collected the freight. The carrier sued the shipper for the charges. In holding that the shipper was not responsible for the forwarder's non-payment, the court at p.1349 held as follows:

> The carrier's statutory obligation to collect full freight was not intended, however, to impose absolute liability on a shipper, but rather to prevent price discrimination by the carrier. As long as someone is liable for the full amount of the freight, so that there is no overcharge or undercharge, the public interest is protected and the statutes are satisfied.

Therefore, if the purposes of the provisions of the Act prohibiting illegal preferences and discrimination were not violated, many courts recognized equitable defenses to freight charge claims.

In *Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972), the carrier sued the consignee of certain merchandise. The bill of lading accompanying the merchandise indicated that the freight charges were to be prepaid. The consignee paid the shipper for the cost of the merchandise plus freight charges. The carrier was unable to make collection from the shipper and then asserted a claim against the consignee. The consignee defended the claim on the ground of estoppel because its payment to the shipper included a provision for freight charges. The consignee argued that in making its payment to the shipper, the consignee relied upon the notation on the bill of lading that the freight had been prepaid. In recognizing the equitable defense to the carrier's claim, the court stated the following at p.1222:

> We think that the crucial question in this case is whether judicial recognition of [the consignee's] estoppel defense will contravene the anti-discriminatory purpose of § 6(7) [of the Act]. We answer this question negatively and find substantial support for our conclusion. (Citations omitted). We discern no conflict here between recognition of (the consignee's) estoppel defense and the anti-discriminatory purpose of § 6(7) [of the Act]. . . . We hold that a consignee of goods who has paid the amount of the freight charges to the consignor may raise the defense of estoppel against a carrier's claim for freight charges.

See also, *Hilt Truck Lines, Inc. v. House of Wines, Inc.*, 299 N.W.2d 767 (Neb. 1980); and *Airborne Freight Corp. v. Irving Trust Company*, 275 N.Y.S.2d 863 (Sup. Ct. N.Y. 1966).

Perhaps the leading case recognizing the estoppel defense to a freight charge claim is *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971). In that case, the court distinguished "undercharge" cases such as *Fink* from cases where the lawful tariff rate was charged but there is a question of which party is responsible for payment. The court noted that in *Fink*, the question of which party was liable for the freight charges was not in issue. Rather, it was the amount to be charged such liable party that was in question. *Id.* at p.61. The court stated the following at p.62:

> So long as payment of the full tariff charges may be demanded from some party, the anti-discrimination policy of the Section is satisfied. Congress did not undertake to settle all issues of collection with the enactment of [the anti-discrimination section of the Act]. Nor did Congress intend to fashion a sword to insure collection in every instance and a shield to insulate the carrier from the legal consequences of otherwise negligent or inequitable conduct.

Therefore, the rule was firmly established that where the anti-discriminatory policies of the Act were not violated, a shipper could assert equitable defenses to a claim asserted against it by a carrier for freight charges. The anti-discriminatory policies of the Act were violated when the issue involved the ***amount*** to be charged the responsible party. Accordingly, if the claim calls for a determination of which party is liable for the freight charges, the policy of the Act prohibiting discrimination was not violated by recognizing an equitable defense.

Beginning with *Admiral, supra*, courts began to expand the applicability of equitable defenses from the double payment situations to circumstances where the loss was caused

by the carrier's violation of the Commission's credit regulations. Beginning at p.62, the *Admiral* court announced the standard by which to determine the applicability of equitable defenses to freight charge claims based upon violation of credit regulations:

> The crucial question is not whether estoppel is urged as a bar to collection of the tariff rate as such, but whether the use of estoppel to prevent recovery on the facts of the particular case contradicts the statutory policy of [the anti-discriminatory provisions of the Act] to curb discriminatory treatment of shippers.

The court concluded at p.63 that:

> [the shipper] does not seek to employ equity to defeat the statute or shift its payment obligations to another while retaining unlawful benefits. The full rate was charged. The only unlawful discrimination was the [carrier's] extension of credit to Rogers. The preferential practices indulged in here are not susceptible to retroactive correction as is the case with an unlawful undercharge. [The carrier's] conduct benefited none but Rogers, and [the consignee's] payment of the full tariff rate removes any possible contention of preferential advantage.

In *Mason & Dixon Lines v. Crossville Rubber Products*, 414 F. Supp. 166 (M.D. Tenn. 1976), it was held that a carrier was estopped from collecting freight charges from a consignee where the carrier violated the Commission's credit regulations. In so holding, the court reasoned that the carrier was "most careless in its manner of extending credit" by failing to investigate the background of its customer to whom it extended credit. *Id.* at p. 169.

Subsequently, in *Brown Transportation Corp. v. Atcon, Inc.*, 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert denied* 49

U.S. 1014, 99 S. Ct. 626, 58 L.Ed.2d 687 (1978), it was again held that violations of the Commission's credit regulations constituted a defense to the carrier's action for freight charges. That case is similar to the case at bar in that the shipper did not execute the non-recourse provision of the bill of lading. Seven months after delivery of the goods, the carrier realized that the consignee was in serious financial difficulty and presented the bill to the shipper and demanded payment. The shipper defended the carrier's claim on the grounds of estoppel. The court held that the carrier, in failing to send a timely bill, extended credit to the consignee for a period longer than that authorized by the regulations. Hence, the carrier's actions barred recovery from the consignor.

For other cases declaring that violations of the Commission's credit regulations constituted a defense to an action by a carrier for freight charges, see, *Aero Mayflower Transit Co. v. Hofberger,* 532 S.W.2d 759 (Ark. 1976); *Aero Mayflower Transit Company v. Harbin,* 126 Ga. App. 72, 190 S.E.2d 91 (1972); *Allied Van Lines, Inc. v. Hanson,* 131 Ga. App. 506, 206 S.E. 2d 108 (1974); *Checker Van Lines v. Siltek Intern. Ltd.,* 169 N.J. Super. 102, 404 A.2d 333 (1979); and *Westover v. United Van Lines, Inc.,* 154 Ga. App. 865, 270 S.E.2d 74 (1980).

It is with this background that the trial court and the Court of Appeals held that Southern Pacific's violation of the Act and the contract between the parties constituted a defense to its claim against Commercial.

3. Propriety of credit violation defense.

The Court of Appeals utilized the problem solving approach suggested by previous courts when resolving issues in this area. In each case, the court should consider whether, under the circumstances presented, allowing the defense would contravene the anti-discriminatory policies of the Act. The crucial question is not whether estoppel is

urged as a bar to collection of the tariff rate as such, but whether the use of estoppel to prevent recovery on the facts of the particular case contradicts the anti-discriminatory provisions of the Act. *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d 56, 63 (7th Cir. 1971). Therefore, courts should utilize the following established procedure in resolving defenses based upon credit violations:

(1) Determine if allowing the defense would violate the anti-discriminatory purposes of the Act. If not,

(2) Analyze the equitable positions of the parties.

a. Holding of Court of Appeals Does Not Contravene Anti-Discriminatory Purpose of Act.

In analyzing this case under the first step of the test, it is apparent that allowing the defense would not violate the anti-discriminatory provisions of the Act. Southern Pacific adamantly argues that the holding of the Court of Appeals is contrary to the anti-discriminatory policies of the Act. In advancing such argument, Southern Pacific employs the very act which it violated to shift the losses caused by its violation onto Commercial.

Southern Pacific argues, in effect, that if a situation occurs where a carrier does not collect its freight charges, the policy against illegal preferences and unjust discrimination have, *ipso facto,* been violated. Such position is illogical. While it may be true that if there is preferential treatment, then there is either undercharging or less than full payment, Southern Pacific inverts this reasoning into an unwarranted assumption that every time there is less than full payment there is preferential treatment. Students of logic would agree that because "A implies B," it does not necessarily follow that "B implies A."

The purpose of the anti-discriminatory provisions of the Act are to prevent a preferential advantage being given one shipper over another shipper through manipulation of transportation charges. In other words, the Act seeks to prevent one shipper from gaining a competitive advantage over its competitor because it can pay a preferential freight charge. Clearly, if a carrier *charges* less than the prescribed tariff rates, an illegal preference has been granted. *Pittsburgh, C.C. & St. L. R. Co. v. Fink*, 250 U.S. 577, 40 S. Ct. 27, 63 L.Ed. 1151 (1919).

However, cases such as this where the carrier has charged the full rate prescribed by tariff but has simply been unable to actually collect it are different from cases such as *Fink* where the carrier did not charge the full rate. Where any party to the transportation contract is liable for the full tariff charges, there is no preference. "His liability satisfies the requirements of the Interstate Commerce Act." *Louisville & N.R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 70, 44 S. Ct. 441, 444, 68 L.Ed. 900, 904 (1924). So long as payment of the full tariff charges may be demanded from some party, the anti-discriminatory policies of the Act are satisfied. *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971). Hence, discrimination is involved when the question is the *amount* of the freight charge. Discrimination is not involved when the question is whether a particular party is responsible for a freight charge, so long as the full freight charge can be demanded against some party.

The fact that a carrier has not collected freight charges is no more than a symptom or a sign that discrimination or preference may be present. In other words, it is entirely possible that no one receives any favoritism in a case where a carrier does not collect the freight charges, so long as the charges can be demanded from some party. For instance, in this case, the freight charges were demanded from Carco. Just because Southern Pacific did

not collect those charges from Carco does not mean, *ipso facto*, that Commercial is being favored.

The party guilty of granting preference in this case is Southern Pacific. It illegally preferred Carco by granting it credit in a manner expressly forbidden by the Act. To turn Southern Pacific's illegal preference against Commercial is illogical. Southern Pacific should not be allowed to use the very Act it violated in structuring an argument against Commercial to recover losses caused by the violation.

In truth and in fact, Commercial has not been favored over anyone. Where is the favoritism to Commercial arising from Southern Pacific's non-collection of the charges? Commercial has not received any more than its purchase price from Carco. That price did not include freight charges. Commercial has not received any benefit as a result of the unpaid freight charges. No "windfall" has been experienced by Commercial. It was precisely this factor which led courts considering double payment cases to conclude that the anti-discriminatory policies of the Act were not violated. See, *Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972).[7]

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[7]Southern Pacific attempts to distinguish double payment cases from this case by arguing that here it made no misrepresentation to Commercial. Since technical estoppel normally involves a misrepresentation, Southern Pacific concludes there is no estoppel in this case. However, Southern Pacific did indeed make a misrepresentation by representing that it would not release the goods until payment was made or it complied with the credit regulation. Furthermore, by failing to notify Commercial for almost two and one-half years of Carco's failure to pay, Southern Pacific misled Commercial into thinking the charges had been paid and everything was all right. It is firmly established that silence may give rise to estoppel as effectively as words spoken where the party is under a duty to speak. *East Texas Fire Ins. Co. v. Perkey*, 35 S.W. 1050, 1052 (Tex. 1896). Because of Southern

Southern Pacific argues in its Brief that there is a possibility of future preferential treatment being given to others as a result of Southern Pacific not collecting its charges. Southern Pacific warns this Court that permitting unlawful conduct of the carrier to provide a defense to a freight charge case leaves the door open to "surreptitious discrimination in the guise of 'accidental' credit violations, intended to release a favored shipper from liability."[8]

The net effect of Southern Pacific's argument is to suggest that carriers will, in the future, purposefully "estop" themselves so that they will be unable to prevail in actions against favored shippers. This argument assumes that if such conduct were analyzed in a court of law, justice would not be achieved and the shipper could prevail against a carrier's claim by having the carrier tell untruths. Such argument is without merit. This Court should not be afraid to rely upon the judicial system to prevent such injustice.

In order for a carrier to use the precedent established by the Court of Appeals to bypass the anti-discriminatory purposes of the Act, a truly unique set of facts must occur. First, the carrier must receive a shipment on a freight collect basis where the shipper did not sign the non-recourse provision of its bill of lading. Next, the carrier would have to intentionally refuse to check the creditworthiness of the consignee prior to relinquishing possession without payment. Then, the consignee would have to become insolvent or otherwise avoid collection efforts of the carrier. The carrier would have to have prior knowledge that this would occur. Then, and only then, would the carrier be in a position to grant any "accidental" preference to the shipper.

Pacific's silence, Commercial was prevented from exerting any influence over its customer to pay the charges. By the time Commercial learned the facts, the demand was stale and there was no hope of obtaining reimbursement from Carco.

[8]See Brief For Petitioner, p. 12.

In addition to these prerequisites, the carrier would, of course, have to first approach the shipper with this proposed deal. After all, if the shipper does not know beforehand that the carrier is intentionally engaging in this complex scheme in order to grant the shipper a preference, the shipper would not have any incentive to return the favor and give the carrier more business. Without prior knowledge on the part of the shipper, the scheme would not benefit the carrier. With prior knowledge, the shipper would probably just be reminded of the simple option to sign the non-recourse provision, avoiding both liability and the risks associated with such an absurd and complex subterfuge by the carrier. The risks would not only be that of losing the suit for collection which, according to Southern Pacific, the carrier is required to file, but also having to pay the attorney's fees associated with the suit. The carrier would, in turn, subject itself to severe penalties imposed by the Commission because of the carrier's violation of the Act's credit restrictions.[9]

There is no reason for a carrier to engage in such unlawful conduct without first informing the shipper, and no reason for the shipper having been approached by the carrier to participate in it when the shipper can reach the same result of avoiding liability simply by signing the non-recourse provision. In short, there is no possibility of discrimination arising from the equitable defense recognized by the courts below.

Southern Pacific argues that a carrier is under an obligation to sue for freight charges it has not collected.[10] Assuming such proposition is true, there is nothing to prevent a carrier from asserting its claims in court. However,

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[9]See Brief For Petitioner, p. 31.

[10]See Brief For Petitioner, p. 11.

the obligation to sue does not imply an obligation to win the suit. Placing a transaction in the hands of a court of law will assure that it is closely scrutinized. The courts are fully capable of determining whether a valid defense exists or whether an "under-the-table agreement" has been made between the litigants. Therefore, placing the matters in the hands of the court system will fully assure that no "accidental" preferences are made.

b. Equity of the Parties.

Because the anti-discriminatory policies of the Act do not apply in this case, there is no overriding public concern and it is appropriate to move to the second step of the analysis by reviewing the equitable position of the parties. In doing so, it is apparent that the decisions below are correct.

Admittedly, Commercial did not sign the non-recourse provision of the bills of lading. However, such omission was not wrongful; i.e., no laws or other obligations were violated or breached. On the other hand, Southern Pacific not only breached the terms of the transportation contract, but also violated the Act. Unlike the conduct of Commercial, Southern Pacific's actions were wrongful; i.e., they violated the law and breached obligations. This conduct directly resulted in the very loss which is the subject matter of Southern Pacific's claim.

Under this analysis, Commercial would not suggest that violations of the credit regulations would always constitute a defense. Unless those violations were the fault of the carrier there would be no equitable defense. For example, if a carrier took sufficient precautions to check the creditworthiness of a consignee on a freight collect shipment, but the consignee refused to satisfy the debt within the time limits prescribed in the regulations, the fact that the

charges were not paid within the time prescribed by the Commission would not constitute a defense to either the consignee or the shipper. Under such set of facts, the carrier would have no control over whether the mandate in the regulations was observed. The judicial system is perfectly capable of determining whether the violation is attributable to factors within the control of the carrier and reaching a just result.

Here, Southern Pacific was in control of all of the circumstances surrounding the release of the goods to Carco. Commercial had no control over the goods once they were delivered to the carrier. No avenue was open to Commercial to force Southern Pacific to comply with the credit regulations. Commercial had so little control over the situation that it did not learn what happened until two and one-half years later.

In this case, the loss would have never occurred had Southern Pacific followed the simple, but mandatory, rules outlined in the Commission's credit regulations. Therefore, Southern Pacific's failure in this regard injured Commercial and should operate to discharge any liability of Commercial to Southern Pacific.

Both Southern Pacific and the Association of American Railroads have cited cases to this Court indicating that equitable defenses to freight rate charges should be denied despite a plea of hardship.[11] Commercial submits that the cited cases do not contravene the holding of the Court of Appeals. When, as in this case, there is an absence of any overriding public policy, the courts are obligated to consider the hardship created for individual parties.

Additionally, such cases were decided during times of a very different regulatory and economic climate than that

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[11] See Brief For Petitioner, p. 12 and Brief of the Association of American Railroads as Amicus Curiae, p. 12.

which exists presently. The Staggers Rail Act of 1980[12] was legislative recognition of this fact. It was essentially a deregulatory act. The Legislative History indicates that the law is intended to assure railroads substantially more rate freedom than was afforded them under prior law. The policy of substantially eliminating rate regulation of railroads where there is effective competition was adopted by this new Act.[13] The Staggers Act placed a greater reliance on competition in the marketplace in order to achieve maximum utilization of railroads.[14] The Legislative History further reveals a Congressional acknowledgment that "competition" is the best control over railroad rates and that the forces of the marketplace will best regulate the financial health of the railroad industry.[15] In recognition of these changed conditions, the entire trend in today's climate is to lessen the amount of governmental involvement in the area of economic regulation.[16] Hence, this Court should not attempt to take a "protective" attitude toward the railroad industry. Congress has expressed an intent that the marketplace and competition be the regulators.

Southern Pacific argues that the railroad industry suffers financially.[17] At the same time, Southern Pacific urges this

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[12] Pub. L. No. 96-448, 94 Stat. 1895 (Oct. 13, 1980).

[13] H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80, *reprinted in* [1980] U. S. Code Cong. & Ad. News, 4110, 4111.

[14] H.R. Rep. No. 1430, 96th Cong., 2d Sess. 87, *reprinted in* [1980] U. S. Code Cong. & Ad. News, 4110, 4119.

[15] H.R. Rep. No. 1430, 96th Cong., 2nd Sess. 89, *reprinted in* [1980] U. S. Code Cong. & Ad. News, 4110, 4120, 4121.

[16] See 49 U.S.C. § 1374, 1551 (deregulation of certain aspects of the air transportation industry).

[17] Brief For Petitioner, p. 16, n. 12.

Court to overrule a holding which in fact encourages better efficiency and business practices of the railroad industry. It must not be forgotten that the entire cause of this loss was Southern Pacific's failure to follow an elementary business practice: checking creditworthiness of customers prior to the extension of credit. Had Southern Pacific spent 1/1000th of the time it has spent on this litigation in checking the creditworthiness of its customer, this loss would have never occurred. The arguments which both courts below flatly rejected were attempts by Southern Pacific to shield its inefficiency by claiming discrimination, where in reality, none existed. The holding of the Court of Appeals discourages railroads from such careless business practices. The net effect should be to ultimately improve the nation's rail industry.

As pointed out by Southern Pacific, nothing in the Act expressly prevents a violation of the Act from creating a defense for a shipper, and the Commission may levy certain penalties for violations of the Act. From this, Southern Pacific concludes that the courts should not attempt to protect rights of the parties by the use of common law. However, this Court has held that federal statutes are to be construed with a presumption favoring the retention of long-established and familiar principles. *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294, 1299 (1952). With respect to the Act here under review, it has been held that where rights of parties are not controlled by the Act, they are to be decided according to the relevant principles of the common law. *American Ry. Express Co. v. Mohawk Dairy Co.,* 144 N.E. 721, 723 (Mass. 1924). Also see, *American Cotton Products Co. v. New York Cent. R. Co.,* 255 N.Y.S. 672, 679 (Mun. Ct. of N.Y. 1932).

Furthermore, the Commission does not have jurisdiction to determine the rights between a carrier and a shipper on a bill of lading. *C-G-F Grain Co., Inc. v. Atchison, T. And S.F.*, 351 I.C.C. 710, 712 (1976). Hence, the statutory scheme contemplates and demands judicial input and active decision making in disputes involving rights under bills of lading. The statutory scheme indeed encourages active participation by the courts by the use of traditional principles of common law and equity.

To be sure, equitable principles are a part of the law. In *Stovall v. Vesely*, 34 P. 2d 862, 864 (N.M. 1934), the court stated the following as a rule of necessity:

> "Equity has the inherent power to supply a method in any suit to protect the rights of all interested."

In *Collins v. United Mine Workers of Am. W. & R. Fund of 1950*, 298 F. Supp. 964, 967 (D.C. 1969), aff'd. 439 F. 2d 494 (D.C. Cir. 1970) the court quite aptly stated:

> "It is part of the genius of the common law and of equity jurisprudence that they are not static but adapt themselves to shifting needs and changing conditions. Mr. Justice Cardozo summarized this doctrine in a few picturesque pointed words. He said:
>
> > 'The Inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have the principle of growth.'" (Footnotes and citations omitted)

Equitable jurisprudence is filled with maxims used by courts in order to achieve justice and fairness. Among them are: "No person shall be allowed to reap the benefits arising from his own wrongful acts;" "Equity regards and treats that as done which in good conscience ought to be done;" and "Equity will not suffer a wrong without a remedy." *Taff v. Smith*, 103 S.E. 551, 553 (S.C. 1920).

Southern Pacific's position in this case is in total derogation of these maxims. It would have this Court reverse both courts below and hold that even though a wrong was committed by Southern Pacific, Commercial is without a defense. Southern Pacific urges that it should be allowed to reap the benefits of its own wrongful acts. This Court should not be so persuaded.

Finally, Southern Pacific argues that violation of the Commission's regulations should not be considered in determining the equitable positions of the parties. It argues that the credit regulations were originally imposed to conserve capital of the railroad industry. Such characterization may be correct as far as it goes. However, as previously discussed, the Commission's regulations were not promulgated to the exclusion of traditional legal principles. It is difficult to believe that the interests of shippers were totally ignored in formulating the regulations and that these principles cannot be considered to protect the interests of shippers.

Furthermore, the interests of shippers are now being actively considered by Congress with regard to transportation legislation. The Legislative History of the Staggers Rail Act of 1980 indicates that one of the primary goals of Congress was, "to provide a regulatory process that balances the needs of carriers, *shippers,* and the public." (Emphasis supplied.)[18] Hence, the interests of shippers are now actively being considered. Therefore, the trial court and the Court of Appeals acted properly by applying traditional legal principles to the actions of the parties.

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[18] H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80, *reprinted in* [1980] U. S. Code Cong. & Ad. News, 4110, 4111; see also, H.R. Rep. No. 1430, 96th Cong., 2d Sess. 89, *reprinted in* [1980] U. S. Code Cong. & Ad. News, 4110, 4121.

The railroads should not be afraid to have their actions reviewed under standards that govern all other segments of the economy. Traditional principles of common law and equity have not harmed this country's economy to date, and there is no reason to believe that it will do so in the future. Therefore, the opinion of the Court of Appeals should be affirmed.

CONCLUSION

The Courts below were correct in holding that the negligence and gross negligence of Southern Pacific constitutes a violation of the express language of the Act and the Commission's regulations. Both courts below properly concluded that such violations constitute a defense to Southern Pacific's claim. Therefore, the judgment below should be, in all respects, affirmed.

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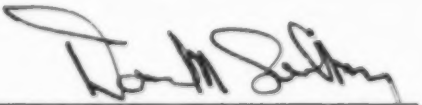
Counsel for Respondent, a member of the bar of the Supreme Court of the United States hereby certifies that Counsel for Petitioner James H. Pipkin, Jr., Charles G. Cole, Steven Reed, Steptoe & Johnson, 1250 Connecticut Ave. N.W., Washington, D.C. 20036, Michael R. Johnson Worsham, Forsythe & Samples, 2001 Bryan Tower, Suite 2500, Dallas, TX 75201, Harold Lentz, Southern Pacific Transportation Co., Room 839, Southern Pacific Building, One Market Plaza, San Francisco, CA 94105 and Patricia A. Smith, Association of American Railroads, 1920 L. St. N.W., Washington, D.C. 20036 and Nelson J. Cooney, 1616 P Street, N.W. Washington, D.C. 20036 have been served with three copies each of the foregoing Brief for Respondent by depositing the documents in a United States Post Office or mailbox with first class postage prepaid.

All parties required to be served have been served.

Dated: February 3, 1982



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Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

v.

COMMERCIAL METALS CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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* A list of petitioner's corporate subsidiaries and affiliates appeared on page (ii) of the Brief for Petitioner filed in this case on December 31, 1981.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-622

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

v.

COMMERCIAL METALS CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

Both the court of appeals and the district court in this case acknowledged that petitioner Southern Pacific Transportation Company ("Southern Pacific") had "established a prima facie case for the recovery of the freight charges" from respondent Commercial Metals Company ("Commercial Metals"). *See* Joint Appendix ("J.A.") at 22, 28-29. As the court of appeals observed, the "sole question" presented by this case is whether a railroad's failure to collect from the consignee strictly in accordance with the credit regulations of the Interstate Commerce Commission bars recovery of the freight charge from the consignor. J.A. at 27.

In apparent recognition of the weakness of the lower court's answer to this question, respondent has now put forward a new set of theories to rationalize the result reached below. Virtually conceding that neither the regulations nor their legislative history purport to create an affirmative defense to a freight charge action, *see* Brief

for Respondent at 27, 29,[1] Commercial Metals for the first time contends that petitioner's asserted violation of the regulations constituted a breach of section 7 of the bill of lading contract, *see, e.g., id.* at 7-8. Indeed, Commercial Metals goes so far as to argue that the lower courts "so held," *see id.* at 11, 18, even though this argument was not presented to either court below, and in fact both courts explicitly found that Southern Pacific had established a prima facie case of Commercial Metals' liability on the contract.

Commercial Metals' breach of contract theory is contrary to sixty years of judicial precedent construing the uniform bill of lading. *See, e.g.*, cases cited at pages 13-15 of Brief of Petitioner. And, under respondent's theory, the non-recourse provision of the bill of lading—which is designed to relieve the consignor from liability when the freight is delivered without payment—would serve no purpose at all.

Respondent has also advanced for the first time the theory that not *all* violations of the credit regulations result in an estoppel, but only those that are the "fault of the carrier." Brief for Respondent at 24. Respondent apparently recognizes that it would be unfair to hold the carrier responsible for asserted violations of the credit regulations that are primarily attributable to circumstances beyond the carrier's control. Respondent does not seem to recognize, however, that its introduction of subjective judgments about "fault" into the determination whether a particular freight charge can be collected would result in both new opportunities for unlawful dis-

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[1] In fact, the ICC has taken the position that credit violations have "no effect" on a consignor's liability under the bill of lading. C-G-F Grain Co. v. Atchison, T. & S.F. Ry., 351 I.C.C. 710, 712 (1976). Although *amicus curiae*, The National Industrial Traffic League ("NITL"), attacks this conclusion as "*obiter dictum*," the ICC's statements in *C-G-F* represent the settled position of the agency responsible for promulgating not only these regulations, but the uniform bill of lading as well.

crimination and an unconscionable waste of resources on the part of litigants and courts.

ARGUMENT

I. RESPONDENT'S BREACH OF CONTRACT THEORY IS MERITLESS

Respondent seizes on language in section 7 of the conditions of the uniform bill of lading to argue that the railroad's asserted failure to comply with the credit regulations constituted a breach of the shipping contract. Section 7 provides, in pertinent part:

> The owner or consignee shall pay the freight and average,[2] if any, and all other lawful charges accruing on said property, but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor . . . shall not be liable for such charges.

J.A. at 37, 41. Respondent argues that the first sentence of section 7 constitutes a condition of the carrier's performance and contractually binds the carrier to abide by the credit regulations for the benefit of the consignor.

Respondent cites no case in which any court, including the courts below, has interpreted section 7 in this fashion. Indeed, while this language has appeared in the uniform

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[2] The term "average," not here relevant, refers to a situation where charges for detention of cars are computed on the basis of the average time of detention of all cars unloaded and released within a particular period.

bill of lading since 1922, *see In re Bills of Lading*, 66 I.C.C. 63 (1922), courts have consistently held that the carrier has no duty to the consignor to require payment from the consignee upon delivery, except where the consignor has executed the non-recourse provision. *See, e.g., Consolidated Freightways Corp. of Delaware v. Pacheco International Corp.*, 488 F. Supp. 68 (C.D. Cal. 1979); *New York, New Haven & Hartford Railroad v. California Fruit Growers Exchange*, 125 Conn. 241, 5 A.2d 353, *cert. denied*, 308 U.S. 567 (1939); *Pennsylvania Railroad v. Marcelletti*, 256 Mich. 411, 240 N.W. 4 (1932); *Western Maryland Railway v. Cross*, 96 W. Va. 666, 123 S.E. 572 (1924). The "well settled" rule, as the Supreme Court of Alabama has observed, is that "the shipper is not relieved on account of a delivery by the carrier of the goods to the consignee without collecting the charges, though credit is voluntarily extended to the consignee. The right to collect from the consignor can only be barred by limitations or contract." *Moss Lumber Co. v. Michigan Central Railroad*, 219 Ala. 593, 594, 123 So. 90, 90 (1929).

The history of section 7 confirms that it was not intended to affect the liability of the consignor. The first sentence of section 7 deals with the relationship between the carrier and the consignee. In the original bill of lading prescribed by the ICC in 1919, the first sentence stated: "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery." *In re Bills of Lading*, 52 I.C.C. 671, 740 App. B (1919). The second sentence provided, as it does now, that the consignor would also be liable unless it executed the non-recourse clause. *Id.*

In 1921, the ICC modified various provisions of the uniform bill of lading, including section 7. In place of the original first sentence describing the liability of the consignee, the ICC inserted the following language: "Except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish

possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid." *In re Bills of Lading*, 64 I.C.C. 357, 364A App. D (1921). This change was merely intended to reflect the 1920 amendment of section 3 of the Interstate Commerce Act, which provided that railroads could only extend credit in accordance with the regulations of the ICC. Transportation Act of 1920, Pub. L. No. 66-152, § 405, 41 Stat. 479.

One year later, a committee of railroads petitioned the ICC to make clear that the 1921 amendment did not affect the consignee's liability to pay the freight charge on receipt of the goods. The railroads proposed that the Commission add a clarifying clause to the first sentence of section 7—similar to the language which had appeared there in 1919—to provide: "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, but . . ." The Commission agreed with the railroads' position, responding, "It was not our intention, in making rules and regulations prescribing the forms of the uniform domestic bill of lading and the uniform livestock contract, to attempt to relieve consignees from the obligation imposed upon them by law." *In re Bills of Lading*, 66 I.C.C. 63, 64 (1922). Accordingly, the Commission accepted the language proposed by the railroads and amended section 7 to read as it does today.[3]

Throughout this history, the first sentence of section 7 dealt only with the legal relationship between the railroad and the *consignee*. The two clauses in the sentence were added at different times for different reasons, and were combined in a single sentence only because both

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[3] Even though the uniform bill of lading may constitute a common law contract when accepted by both parties, the terms of this contract are prescribed by the Commission in accordance with federal law. *See, e.g.*, In re Bills of Lading, 64 I.C.C. 357, 360-61 (1921). Thus, the Commission's construction of the terms of the uniform bill of lading must be viewed as authoritative.

relate to the consignee. Clearly, language added at the request of the railroads to confirm the liability of the *consignee* can provide no basis for relieving the *consignor* from liability.[4]

Moreover, respondent's interpretation would render the second sentence of section 7 virtually meaningless. If the carrier must "either receive payment or assure itself of such payment" before making the delivery, *see* Brief for NITL at 6, the consignor would never have any liability against which the non-recourse clause could protect it. As one court has commented, "[T]he uniform bill of lading expressly accords the shipper the privilege of absolving himself from liability for charges by executing the non-recourse clause and thereby excludes implication of a right to attain the same object in some other and undefined way." *New York, New Haven & Hartford Railroad v. California Fruit Growers Exchange*, 125 Conn. 241, 241-42, 5 A.2d 353, 359, *cert. denied*, 308 U.S. 567 (1939).

In summary, respondent's newly minted contract theory is inconsistent with a long history of interpretation of the uniform bill of lading. It is also inconsistent with the purpose and history of the credit regulations. Respondent

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[4] *Amicus* NITL, apparently out of confusion over the respective liabilities of the consignor and the consignee, has completely misconstrued this action of the ICC. *See* Brief for NITL at 5-6. NITL takes the position that the consignee, upon acceptance of delivery, becomes "exclusively liable for the freight charges." *Id.* at 5. This is a misstatement of the law. Both the consignee and the consignor are primarily liable for the freight charge, much as a principal and his surety are each primarily liable for a debt the principal owes. *See, e.g.*, A. Stearns, The Law of Suretyship § 1.5 (5th Ed. 1951); F. Childs, Law of Suretyship and Guaranty § 12 (1907). As this Court stated in Illinois Steel Co. v. Baltimore & O. R.R., 320 U.S. 508 (1944): "[I]f the non-recourse clause is not signed by the consignor, he remains liable to the carrier for all lawful charges. . . . [I]f delivery is made to the consignee without payment, the consignee is *also* liable for all freight charges." *Id.* at 513 (emphasis added).

has failed to challenge petitioner's demonstration that these regulations were designed for the protection of the railroads and that contemporaneous judicial construction rejected implication of an affirmative defense for the benefit of consignors. The regulations do not authorize the creation of an affirmative defense, and respondent should not be permitted to achieve the same result through a distorted reading of the uniform bill of lading.[5]

II. RESPONDENT'S PROPOSED "FAULT" STANDARD FOR APPLICATION OF THE CREDIT VIOLATION DEFENSE WOULD RESULT IN CONFUSION AND DISCRIMINATION

Although the court of appeals held, without qualification, that a carrier's "failure to comply with the applicable ICC regulations is a defense, available to [the consignor], in an action by the carrier for unpaid freight charges," J.A. at 34, respondent now avers that it "would not suggest that violations of the credit regulations would always constitute a defense." Brief for Respondent at 24. According to respondent's new theory, only violations that are "the fault of the carrier" should give rise to this defense. *Id.* Respondent's proposed "fault" standard raises more questions than it answers, however. What is "fault?" Is it the "fault" of the carrier if, as here, it accepts a check in the ordinary course of business and the check is subsequently dishonored? Does "fault" require intent? Can intent be inferred from the circumstances of the alleged violation? Is negligence enough? Gross negligence? Respondent suggests no clear answer to these

[5] Even if the uniform bill of lading were viewed as including some form of stipulation that the carrier would comply with the credit regulations, this would not provide a basis for the consignor to escape its payment obligation. "Conditions precedent are not favored and the courts will not construe stipulations as conditions unless required to do so by plain unambiguous language." United States v. Schaeffer, 319 F.2d 907, 911 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964); 5 Williston on Contracts § 665 (3d ed. 1961). *See also* Restatement (Second) of Contracts § 229 (1981) ("Excuse of a Condition to Avoid Forfeiture").

questions, nor can it cite even one case in which any such "fault" standard has been applied by a court. Respondent's proposed rule is no less than an invitation to this Court to launch a new litigation specialty.

Moreover, the subjectivity of any conceivable "fault" standard threatens to undermine the anti-discriminatory purpose of the Interstate Commerce Act. Even respondent concedes that no equitable defense that facilitates discrimination should be allowed. *See* Brief for Respondent at 18-19.[6] If a credit violation defense is adopted, a carrier that has failed to collect the freight charge from the consignee under circumstances similar to those presented here must answer two questions in determining whether to bring an action against the consignor: (1) has there been a violation of the credit regulations, and (2) was the violation the carrier's "fault?" Respondent's suggestion that the judicial system will ensure that consignors in such cases receive equal treatment, *see* Brief for Respondent at 22-24, ignores the realities of the freight collection system. A railroad's obligation to bring suit for charges lawfully owed to it does not include an obligation to institute lawsuits the railroad knows it will lose. *But compare id.* at 24. If the railroad must decide in each instance whether a valid, equitable defense exists to its freight charge action, many such actions may never reach the courts because powerful shippers will attempt to discourage the railroad from bringing suits against them. Yet, the very subjectivity of the "fault" standard would make it difficult for the ICC to demonstrate in any particular case that a carrier had intentionally discriminated in favor of a shipper. *See* 49 U.S.C. § 11903 (Supp. III 1979).

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[6] Respondent argues that the anti-discriminatory policies are implicated only when the issue is the *amount* of the charge, not whether a party is responsible. Brief for Respondent at 5, 16. However, discrimination occurs with equal unfairness where the freight charge is avoided altogether as where less than the full amount is paid.

Moreover, even absent a "fault" limitation, the credit violation defense introduces a strong element of uncertainty and potential favoritism into the collection of freight charges. As petitioner has already pointed out, determining whether a credit violation has occurred at all will often involve a substantial factual inquiry. *See* Brief for Petitioner at 31. *See also United States v. Western Pacific Railroad*, 385 F.2d 161, 163 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *United States v. Southern Railway*, No. 78-0519, slip op. at 6-7 (D.D.C. May 15, 1980) (unpublished). The permissibility of particular commercial practices or forms of credit precautions will frequently be at issue. In the present case, for example, respondent argues that Southern Pacific should be denied recovery of the freight charge not only on the first car, which was delivered without advance payment, but also on the two cars for which Southern Pacific demanded payment by checks before delivery. Respondent has made no attempt to show that acceptance of a check is not a recognized commercial practice in the industry. *See Fullerton Lumber Co. v. Chicago, Milwaukee, St. Paul & Pacific Railroad*, 282 U.S. 520, 522 (1931). Nor has respondent indicated the source of petitioner's supposed legal authority to withhold delivery of a subsequent shipment in order to ensure payment of an earlier charge. *See* Brief for Respondent at 9-10. As petitioner has already demonstrated, once the consignee offered payment of the freight charges on the second and third cars, Southern Pacific could not have withheld delivery without risking liability to Carco for conversion of its goods. *See* Brief for Petitioner at 32. Yet respondent insists that these transactions involved credit violations that should preclude recovery by the carrier. In light of such ambiguities, the potential for discrimination is manifest.

Respondent argues, in effect, that discrimination and other adverse consequences should be ignored because numerous other equitable defenses have been recognized by the lower courts, despite this Court's firm admonitions to the contrary. Respondent cites a series of cases in

which *consignees* have been released from their obligation to pay the carrier on the ground they had already made payment to the consignor in reliance on explicit misrepresentations by the carrier. *See, e.g., Consolidated Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971); *Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972); *Farrell Lines Inc. v. Titan Industrial Corp.*, 306 F. Supp. 1348 (S.D.N.Y.), *aff'd*, 419 F.2d 835 (2d Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970); *Southern Pacific Co. v. Valley Frosted Foods*, 116 A.2d 70 (Pa. Super. Ct. 1955). Whatever the validity of these decisions on their own facts, they are plainly inapplicable to the present case, since here there has been neither a misrepresentation by the railroad nor any reliance by the consignor.[7] Moreover, the consignor in this case, unlike the consignees in earlier cases, had ample opportunity to protect itself against liability simply by executing the non-recourse clause.[8]

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[7] Southern Pacific never communicated in any way with Commercial Metals prior to delivery of the freight, so it is not even possible for a misrepresentation to have occurred at that time. While Southern Pacific did not demand payment from Commercial Metals immediately after delivery, there is no question that Southern Pacific was engaged in a good faith effort to collect the freight charge from the consignee. Respondent's assertion that the carrier's initial failure to notify Commercial Metals of the outstanding liability should estop the carrier from recovering, *see* Brief for Respondent at 21 n.7, was expressly rejected by the district court in this case. *See* J.A. at 23.

Moreover, contrary to respondent's suggestion, petitioner does not distinguish the so-called "double payment" cases solely, or even primarily, on the basis of the misrepresentation factor. As then-Judge Stevens noted in his concurring opinion in *Admiral*, the critical factor in the "double payment" cases is that "an innocent consignee [would be required] to defray freight costs exactly double the amount contemplated by the applicable tariffs." 442 F.2d at 65. Here, Commercial Metals has not paid the freight charge to the railroad or anyone else.

[8] Respondent has cited only one case in which a consignor, having the right to protect itself through the non-recourse clause, has

Respondent chides petitioner for seeking to avoid having its actions "reviewed under standards that govern all other segments of the economy." Brief for Respondent at 30. But it is respondent, not petitioner, which is relying upon highly technical regulations of the Interstate Commerce Commission as a defense to its lawful liability. Indeed, respondent relies on these rules even though the ICC itself takes the position that they do not establish such a defense. *See C-G-F Grain Co. v. Atchison, Topeka & Santa Fe Railway*, 351 I.C.C. 710, 713 (1976). Moreover, respondent ignores the ICC's recent proposal that these rules be repealed, because they are "simply not realistic for many of the situations in which they apply." *Ex parte Nos. MC-1, 73, 143, and 170*, 45 Fed. Reg. 31766 (1980).

In apparent recognition of the weakness of its argument for an implied affirmative defense, respondent now seeks to portray this dispute as a common law controversy in which respondent may invoke the rules of equity to bar recovery. In the final analysis, however, respondent has very little to say about the application of equitable principles to the facts of this case. Noting that "[e]quitable jurisprudence is filled with maxims," respondent cites a series of homilies that bear no relationship to these circumstances. While it may be true that "No person shall be allowed to reap the benefits arising from his own wrongful acts," Respondent's Brief at 28, petitioner does not seek to recover profits from a misdeed, but simply seeks compensation for a legitimate service already ren-

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been permitted to assert a defense based on a credit violation. *See* Brown Transportation Corp. v. Atcon, Inc., 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014 (1978). Petitioner submits that *Brown Transportation* was wrongly decided and that it illustrates the absurdity of the credit violation defense, since the carrier in that case was left empty-handed because of a mere technicality (the failure to bill the consignee within seven days).

dered.[9] The other equitable maxims cited by respondent—such as "Equity regards and treats that as done which in good conscience ought to be done" and "Equity will not suffer a wrong without a remedy" [10]—are similarly inapposite. Indeed, if any equitable theory is relevant to respondent's effort to leave Southern Pacific uncompensated, it is that equity abhors a forfeiture. *See Jones v. Guaranty and Indemnity Co.*, 101 U.S. 622, 628 (1879); *McClintock on Equity* § 33 (2d ed. 1948); 27 Am. Jur. 2d *Equity* § 74 at 597 (1966) ("equity will not construe the language of an instrument so as to imply a provision for forfeiture where none is expressed").

In summary, Commercial Metals has shifted its focus from reliance on an affirmative defense implied directly from the credit regulations to reliance upon various common law theories and principles. But even if the ordinary rules of the common law were fully applicable in this highly regulated area—and the decisions of this Court clearly indicate that they are not [11]—respondent has failed

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[9] Respondent's suggestion that Southern Pacific seeks to be held "immune from the consequences of its wrongful actions" (Brief for Respondent at 12) is plainly incorrect. As pointed out in petitioner's opening brief (at 30), the ICC has ample authority to police those credit practices that, in the agency's view, warrant deterrence. Moreover, economic incentives compel railroads to collect freight charges from the consignee to the extent it is possible to do so. Every unwise extension of credit carries with it the seeds of the railroad's punishment—in the form of delay, litigation expense and the possibility of noncollection. As the history of this lawsuit attests, these provide adequate deterrents to violations of the credit regulations.

[10] Where a carrier has committed a violation of the credit regulations, the wrong *is* subject to remedy—the remedies imposed by the ICC. But where the consignor is relieved of all liability on the basis of such a violation, the carrier has no means of obtaining compensation for the service it performed.

[11] *See e.g.*, Louisville & N.R.R. v. Central Iron & Coal Co., 265 U.S. 59, 65 (1924); Pittsburgh, C.C. & St. L. Ry. v. Fink, 250 U.S 577, 581-83 (1919),

to demonstrate any basis, apart from the credit regulations, for its proffered defense. In view of the consistent judicial rejection of this defense for more than five decades after the credit regulations were issued, and because such a defense would encourage discrimination and disrupt the national transportation system, this Court should not permit it to be engrafted upon the regulatory scheme.

CONCLUSION

Because the lower court erred in permitting respondent, which was primarily liable under the terms of the bill of lading, to assert an affirmative defense based on a violation of the credit regulations, the judgment below should be reversed and the case remanded with instructions to the district court to enter judgment for the petitioner.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE

Certiorari was granted on November 17, 1981. This brief is filed by American Trucking Associations, Inc. (ATA), the national organization of the motor carrier industry, on behalf of all motor common carriers of property regulated by the Interstate Commerce Commission and subject to its credit regulations, 49 C.F.R. §§ 1320-1324. The concerns of these motor carriers lie at the heart of the dispute at bar and therefore may be helpful to this Court in resolving the important questions presented by this litigation. ATA has received the consent of all parties before the Court of Appeals to the filing of this brief.

STATEMENT

At issue is the effect of a purported violation by a delivering carrier of regulations of the Interstate Commerce Commission (ICC) governing the extension of

credit by regulated carriers, 49 C.F.R. §§ 1320-1324, upon a consignor's liability for lawful transportation charges for which the consignor is primarily liable under the bill of lading contract. The case before the Court involves a rail carrier, Southern Pacific Transportation Co. (SPT). However, the credit regulations governing motor common carriers of property are virtually identical to those governing rail carriers; the principal difference being the maximum time periods for credit extensions permissible for each mode. Because of this similarity in the regulations the courts have generally treated cases concerning the credit regulations of each mode interchangeably. *See Consolidated Freightways Corp. of Del.* v. *Eddy*, 260 Ore. 385, 513 P.2d 1161, 1163 (1973). Further, the pertinent provisions of the bill of lading contract of carriage, specifically section 7, known as the non-recourse clause, are also a part of the bill of lading generally issued by motor common carriers of property. Thus, whatever action the Court takes on the SPT petition will have a material and substantial effect on the relationship between and liabilities of motor common carriers of property and their shippers.

There is a split in both the federal and state courts concerning this issue. Some courts have held that no such equitable defense exists which would absolve a shipper from liability for lawful transportation charges based on published tariffs filed with the ICC. Other courts have permitted equitable defenses to a shipper's otherwise lawful liability. The motor carrier industry is greatly concerned that its ability to comply with the requirements of the Interstate Commerce Act, requiring carriers to collect the lawful tariff charges, 49 U.S.C. §§ 10741 and 10761, and the resulting financial stability of the industry will be adversely affected should the decision of the United States Court of Appeals for the Fifth Circuit under review not be reversed. Further, such a result would severely impair the ability of motor carriers of

property to continue extending credit on collect shipments and would thus defeat one of the primary purposes of section 10743, 49 U.S.C. § 10743, and the regulations promulgated thereunder, *i.e.*, the facilitation of interstate freight transportation.[1]

ARGUMENT

Carrier's Violations of the ICC's Credit Regulations Do Not Constitute a Valid Defense For Consignor Against Liability For Lawful Transportation Charges

In the instant case, the Fifth Circuit Court of Appeals found that the "carrier's failure to comply with the applicable ICC regulations is an available defense in an action brought by a carrier, SPT, against a consignor, Commercial, for unpaid freight charges." *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 641 F.2d 235, 239 (5th Cir. 1981). The Court made this finding notwithstanding that the consignor had contractually agreed to remain primarily liable for the freight charges in question, and that the carrier had, prior to approaching the consignor, made a reasonable effort, albeit unsuccessful, to collect the charges from the consignee.[2]

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[1] Section 10743 requires a carrier to obtain full payment of transportation charges prior to giving up possession at destination, except that carriers may extend credit under regulations of the ICC governing payment for transportation and service. The initial statutory provision was enacted in 1920 as section 3(2) of Part I of the Interstate Commerce Act, former 49 U.S.C. § 3(2). A corresponding provision governing the extension of credit by motor carriers was enacted as part of the Motor Carrier Act of 1935, former 49 U.S.C. § 222. The parallel provisions were consolidated and recodified without substantive change as section 10743 in the 1978 recodification of the Interstate Commerce Act, Pub. L. 95-473, 92 STAT. 1337-1470 (Oct. 17, 1978). Applicable provisions of the statute are attached as Appendix A.

[2] The standard bill of lading issued by both motor and rail carriers contains a "non-recourse clause." (Section 7 of the bill of lading contract.) It is universally understood in the transportation industry

We believe the Court of Appeals erred in its finding, and in its interpretation of the meaning and purpose of the ICC's credit regulations. It has incorrectly accepted the consignor's defense that the carrier's right to collect tariff charges is barred because of the latter's alleged violation of the Interstate Commerce Act, 49 U.S.C. § 10743, and regulations promulgated pursuant thereto. While it is a longstanding principle of law that the violation of a statute may give rise to a civil remedy, *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U.S. 33, 36 S. Ct. 482 (1915), the lower court erred in not requiring the party seeking to assert that remedy to establish that it is a member of the class of persons for whose protection the statute was presumably passed. *Arnesen* v. *Raymond Lee Organization*, 333 F.Supp. 116 (C.D.Cal. 1971). The same rule would hold true for a federal regulation.[3]

The regulation which the consignor alleges has been violated was not promulgated to protect its interest but rather to assure that carriers are able to collect lawful transportation charges due them. The protections which the law and regulations governing extension of credit have sought to bestow are, first, to protect regulated carriers' working capital by reducing the amount of freight charges outstanding in their accounts receivable, thus reducing the risk of bankruptcy and financial instability, and secondly, to eliminate credit discrimination among shippers. *See* Ex Parte No. MC-1, *Payments of Rates*

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that, if a consignor fails to sign this clause he agrees to remain primarily liable for the full freight charges on collect shipments, even though the carrier will make every reasonable effort first to collect the applicable charges from the consignee. It is not until a carrier's efforts to collect from the consignee have failed that a carrier would initiate a claim for the freight charges against the consignor.

[3] Legislative rules such as the ICC's credit regulations are deemed to have "the status of law." *See* United States v. Mersky, 361 U.S. 431, 437, 80 S. Ct. 455, 463 (1960) and Maryland Casualty Co. v. United States, 251 U.S. 342, 349, 40 S. Ct. 155, 158 (1920).

and Charges of Motor Carriers, 2 M.C.C. 365, 374 (1937) and Ex Parte No. 73, *In Re Section 3 of Interstate Commerce Act as Amended*, 57 I.C.C. 591 (1920), and 171 I.C.C. 268 (1931); *also*, Ex Parte No. 73, *Regulation for Payment of Rates and Charges*, 273 I.C.C. 681, 686 (1949); 310 I.C.C. 391, 394 (1960); and 326 I.C.C. 483, 491 (1966). The Fifth Circuit's decision would work to the detriment of each of these goals.

The collective purpose of sections 10743 and 10761 and the Commission's rules is to assure the collection of lawful freight charges by carriers. By enabling consignors to avail themselves of the challenged defense, the Fifth Circuit's decision thwarts carriers' ability to collect outstanding charges due them. Further, the Fifth Circuit's decision misperceives the anti-discriminatory objective of the Interstate Commerce Act and the credit regulations promulgated thereunder. Quoting *Consolidated Freightways Corp. of Del.* v. *Admiral Corp.*, 442 F.2d 56, 62 (7th Cir. 1971), the Fifth Circuit's decision states that "[s]o long as payment of the full tariff charges may be demanded from some party, the anti-discrimination policy of the Section [Act] is satisfied," 641 F.2d at 238. The Interstate Commerce Act requires more than a mere "demand" for charges from some party, it requires their collection, *see* 49 U.S.C. §§ 10743 and 10761. If the Fifth Circuit were correct in maintaining that "demand" alone is sufficient, it would render the Congressional mandate of these two sections nugatory, with the result that carriers could discriminate between those shippers upon whom they would make a demand and those from whom they would collect.

The Fifth Circuit's decision also sanctions a consignor's breach of its contractual agreement with a carrier. Section 7 of the bill of lading contract provides, in relevant part:

> The consignor shall be liable for the freight and all other lawful charges, except that if the consignor

> stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges.

As stipulated to by the parties, the consignor in the instant case failed to execute the section 7 non-recourse provision. But for the defense of the carrier's violation of the credit regulations, the consignor would be otherwise liable to the carrier for the full amount of the transportation charges. The consignor here has not claimed that it did not understand the operative effect of section 7. Having the option of executing section 7 of the bill of lading contracts, the consignor here, for whatever unexplained reason, elected not to do so. Thus, the carrier properly availed itself of its rights pursuant to section 7 of the bill of lading contract.[4]

The motor carrier industry has had an opportunity to evaluate the practical implications of the lower court's decision, and it is the considered opinion of this industry that unless the decision is overturned, the net effect will be to render the non-recourse provision of bills of lading virtually unenforceable. This would have the ultimate effect of eliminating any extensions of credit to shippers by motor carriers of shipments moving on a collect

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[4] Nor does there appear to have been any violation of the credit regulations with regards to the second and third shipments. The carrier received a check in payment of the lawful tariff charges on those shipments. Acceptance of payment of transportation charges by check does not constitute a grant of credit. Further, pursuant to the bill of lading contract and the ICC's credit regulations, the carrier was required to bill only the consignee for the charges due. The ICC has issued an informal ruling to this effect in response to an inquiry made by a motor carrier involved in a similar situation. A copy of that ruling is attached as Appendix B.

basis.[5] Clearly Congress did not intend for sections 10743 and 10761 to have this effect.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[5] The problem which would confront shippers and carriers alike if credit on collect shipments should become impractical would be monumental. Approximately 50 percent of interstate shipments of property by motor carrier move on a collect basis. Approximately $24 billion in freight charges are involved in these shipments. The value of the property involved in these shipments is beyond estimate. However, transportation charges are usually only a small portion of the value of the freight shipped. The Fifth Circuit's ruling would require carriers to either hold freight at destination until consignees have made payment of freight charges by cash or other appropriate means or have the even more impractical result of requiring carriers' drivers to collect the charges at time of delivery. The resulting delays in the movement of goods in interstate commerce, and the increase in carrier costs passed on to the public in the form of higher freight rates would be in direct conflict with the national transportation policy, 49 U.S.C. § 10101, and the goals of the Interstate Commerce Act.

Appendix

APPENDIX A

APPLICABLE STATUTES AND REGULATIONS

Statutes:

49 U.S.C. § 10741. *Prohibitions against discrimination by common carriers*

(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

* * * *

49 U.S.C. § 10743. *Payment of rates*

(a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by its only when payment for the transportation or service is made.

(b) (1) Under regulations of the Commission governing the payment for transportation and service and preventing descrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service. The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers.

(2) Such a carrier (including a motor common carrier being used by a freight forwarder) may extend credit for transporting property for the United States Government, a State, a territory or possession of the United States, or a political subdivision of any of them.

49 U.S.C. § 10761. *Transportation prohibited without tariff*

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection or application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

Regulations:

49 C.F.R. Part 1322—*Extension of credit to shippers by motor carriers*

§ 1322.1 *Carrier may extend credit to shipper*

(a) Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within

the credit period herein specified, common carriers by motor may relinquish possession of freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days excluding Saturdays, Sundays, and legal holidays. When the freight bill covering a shipment is presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following the presentation of the freight bill. In regard to traffic of nonprofit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the carriers shall require such organizations to furnish the names of the beneficial owners of the property in the bills of lading or at least have the bills of lading incorporate by reference a document containing the names of the beneficial owners.

(b) [Reserved]

(c) *Exceptions—Carriers of household goods.* The provisions of paragraphs (a) and (b) of this section shall not apply in any instance in which the carrier shall be required by § 1056.8(b) of this chapter, "Transportation of household goods in interstate or foreign commerce," to relinquish possession of a shipment of household goods in advance of the payment of the total amount of the tariff charges thereon.

(d) *Exceptions—Carriers of household goods.* Except as provided in paragraph (c) of this section, motor common carriers of household goods must also provide in their tariffs that (1) the aforestated credit period of 7 days excluding Saturdays, Sundays, and legal holidays shall automatically be extended to a total of 30 calendar days for any shipper who has not paid the carrier's freight bill within the aforesaid 7-day period, (2) such shipper will be assessed a service charge by the carrier equal to 1 percent of the amount of said freight bill,

subject to a $10 minimum charge, for such extension of the credit period, and (3) no such carrier shall grant credit to any shipper which fails to pay a duly presented freight bill within the 30-day period, unless and until such shipper affirmatively satisfies the carrier that all future freight bills duly presented will be paid strictly in accordance with the rules and regulations prescribed by the Commission for the settlement of carrier rates and charges. *Provided*, That no service charge authorized herein shall be assessed in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or territory, or political subdivision thereof, or for the District of Columbia.

§ 1322.2 *Credit for additional charges after freight relinquished.*

Where a common carrier by motor vehicle has relinquished possession of freight and collected the amount of tariff charges represented in a freight bill presented by it as the total amount of such charges, and another freight bill for additional charges is thereafter presented to the shipper, the carrier may extend credit in the amount of such additional charges for a period of 30 calendar days, to be computed from the first 12 o'clock midnight following the presentation of the subsequently presented freight bill.

§ 1322.3 *Period of credit following delivery of freight.*

Freight bills for all transportation charges shall be presented to the shippers within 7 calendar days from the first 12 o'clock midnight following delivery of the freight except that motor common carriers of household goods and motor common carriers of oilfield equipment shall present their freight bills for all transportation charges to the shipper within 15 calendar days, excluding Saturdays, Sundays, and holidays, from the first 12 o'clock midnight following delivery of the freight.

§ 1322.4 *Freight bills may be presented by mail.*

Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing, the postmark shall be accepted as showing such time.

§ 1322.5 *Payment by checks, drafts, or money orders.*

The mailing by the shipper of valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit period allowed such shipper, may be deemed to be collection of the tariff charges within the credit period for the purposes of the rules in this part. In case of dispute as to the time of mailing, the postmark shall be accepted as showing such time.

§ 1322.6 *Charge card plans not included.*

The provisions of this part shall not apply to payments of interestate transportation charges by use of charge cards when a carrier offering charge card payment service(s) has obtained approval for such charge card plan(s) as provided in § 1056.25 of this chapter and when the shipper of household goods does not force an involuntary extension of credit by the carrier by causing the charge card issuer to reverse the charge transaction and charge payments back to the carrier's account.

APPENDIX B

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

Bureau of Operations

Mr. Carl A. Jonson, P.S.
300 Central Bldg.
Seattle, Washington 98104

Dear Mr. Jonson:

Thank you for your letter of August 6, 1979, concerning the extension of credit provisions found in Section 1322.3 of the Commission's regulations (49 C.F.R. 1332.3).

The freight bills involved were billed collect to the consignee on the bills of lading prepared by the consignor. The consignor did not sign the non-recourse provision of Section 7 of the bill of lading. After the carrier failed to collect from the consignee, it sought collection of the charges from the consignor. The freight bills were not presented to the consignor within seven days of delivery.

Specifically, you ask if the above carrier is in violation of the above cited regulation, which requires carriers to present freight bills to the shippers within seven days of delivery.

The term "shippers" as used in the above regulation is defined as "persons who undertake to pay the freight charges." 49 C.F.R. 1322.1(a).

On any one shipment, either the consignor or the consignee undertakes to pay the freight charges. The carrier's obligation under Section 1322.3, therefore, in my informal opinion, is to present a freight bill within seven days of delivery to either one of those parties.

With respect to collect shipments as are involved in your case, the consignee is the party which undertakes to pay the freight charges.

In view of the foregoing, the carrier's failure to bill the consignor within seven days of delivery on a collect shipment is not, in my informal opinion, a violation of Section 1322.3 of the regulations.

The only jurisdiction of which I am aware construing the credit regulations to require a double-billing is Georgia. See *Brown Transport Corp.*, v. *Atcon, Inc.*, 241 S.E. 2d 50 (Ga. Ct. App., 1978).

Any portions of this Bureau's letter to you of July 25, 1979, inconsistent with this informal opinion are hereby overruled.

Very truly yours,

/s/ Robert S. Turkington
ROBERT S. TURKINGTON
Assistant Director
ROBERT S. TURKINGTON

Amicus Brief

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FILED
DEC 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-622

In the

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHERN PACIFIC TRANSPORTATION CO,
Petitioner,

v.

COMMERCIAL METALS CO,
Respondent.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE*

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

LIST OF MEMBERS OF ASSOCIATION OF AMERICAN RAILROADS

Full Member Roads (U.S. Lines)

Akron, Canton & Youngstown Railroad Company
Alton & Southern Railway Company
Atchison, Topeka & Santa Fe Railway Comapny
Atlanta & St. Andrews Bay Railway Company

Baltimore & Ohio Railroad Company
  Curtis Bay Railroad Company
  Staten Island Railroad Corporation
Baltimore & Ohio Chicago Terminal Railroad Company
Bangor & Aroostook Railroad Company
  Van Buren Bridge Railroad
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Boston and Maine Corporation
  Springfield Terminal Railway
Burlington Northern Railroad Company
  Oregon Electric Railway
  Oregon Trunk Railway
  Walla Walla Valley Railway

Cambria & Indiana Railroad Company
[Canadian Pacific Limited — lines operated in U.S.]:
  Canadian Pacific lines in Maine
  Canadian Pacific lines in Vermont
Carbon County Railway Company
Chesapeake & Ohio Railway Company
  Covington & Cincinnati Elevator Railroad
    & Transfer & Bridge Company
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
  Washington, Idaho & Montana Railway Company

Clinchfield Railroad Company
Colorado & Southern Railway Company
Consolidated Rail Corporation

Denver & Rio Grande Western Railroad Company
Detroit & Mackinac Railway Company
Detroit & Toledo Shore Line Railroad Company
Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway Company

Fort Worth & Denver Railway Company

Galveston, Houston & Henderson Railroad Company
Georgia Railroad
[Grand Trunk Corporation — and other lines in the U.S. indirectly controlled by the Canadian National Railways]:
  Grand Trunk Western Railroad Company
  Detroit, Toledo & Ironton Railroad Company
  Central Vermont Railway, Inc.
  Duluth, Winnipeg & Pacific Railway Company

  [Canadian National Railways]:
    Lines in Michigan
    Lines in New England
    Lines in New York
    Lines in Vermont
Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company

Illinois Central Gulf Railroad Company
  Chicago & Illinois Western Railroad Company
  Waterloo Railroad

Johnstown & Stony Creek Rail Road Company

Kansas City Southern Railway Company
  Arkansas & Western Railway Company
  Fort Smith & Van Buren Railway Company
  Kansas & Missouri Railway & Terminal Company
Kentucky & Indiana Terminal Railroad

Lake Superior & Ishpeming Railroad Company
Lake Terminal Railroad Company
Louisana & Arkansas Railway Company
Louisville & Nashville Railroad Company
Carrollton Railroad Company

McKeesport Connection Railroad Company
McCloud River Railroad Company
Maine Central Railroad Company
Portland Terminal Company
Manufacturers Railway Company
Minneapolis, Northfield & Southern Railway Company
Missouri-Kansas-Texas Railroad Company
including Beaver, Meade & Englewood Railroad Company
Missouri Pacific Railroad Company
Brownville & Matamoras Bridge Terminal Company
Chicago Heights Terminal Transfer Company
Doniphan, Kensett & Searcy Railway Company
Weatherford Mineral Wells and Northwestern Railway Company
National Railroad Passenger Corporation (AMTRAK)
Newburgh & South Shore Railway Company
Norfolk and Western Railway Company
Chesapeake Western Railway Company
Delaware & Hudson Railway Company
Greenwich & Johnsonville Railway Company
Lake Erie & Fort Wayne Railroad Company
Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin & Danville Railway Company

Peoria & Pekin Union Railroad Company
Pittsburg & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
Montour Railroad Company
Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company

Richmond, Fredericksburg & Potomac Railroad Company

St. Louis Southwestern Railway Company
Seaboard Coast Line Railroad Company
  Columbia, Newberry and Laurens Railroad Company
  Durham & Southern Railway Company
  Gainesville Midland Railroad Company

Soo Line Railroad Company
  Sault Ste. Bridge Company
Southern Pacific Transportation Company
  Holton Inter-Urban Railway Company
  Northwestern Pacific Railroad Company
  Petaluma & Santa Rosa Railroad Company
  Visalia Electric Railroad Company
Southern Railway System
Alabama Great Southern Railroad Company
  Algers, Winslow & Western Railway Company
  Atlantic & East Carolina Railway Company
  Camp Lejeune Railway Company
  Central of Georgia Railroad Company
  Cincinnati, New Orleans & Texas Pacific Railway Company
  Georgia Northern Railway Company
  Georgia Southern & Florida Railway Company
  Interstate Railroad Company
  Live Oak Perry & South Georgia Railway Company
  Louisiana Southern Railway Company
  New Orleans Terminal Company
  Norfolk Southern Railway Company
  St. Johns River Terminal Company
  State University Railroad Company
  Tennessee, Alabama & Georgia Railway Company
  Tennessee Railway Company

Texas Mexican Railway Company

Union Pacific Railroad Company
  Spokane International Railroad Company
  Mt. Hood Railway Company
Union Railroad Company (Pittsburgh)

Vermont Railway, Inc.

Western Maryland Railway Company
Western Pacific Railroad Company
  Sacramento Northern Railway Company
  Tidewater Southern Railway Company
Western Railway of Alabama
  Atlanta & West Point Rail Road Company
Winston-Salem Southbound Railway
  High Point, Thomasville & Denton Railroad

Special Canadian And Mexican Member Roads

CANADIAN LINES (in Canada)

  Algoma Central Railway
  Canadian National Railways
  Canadian Pacific Limited
    includes Dominion Atlantic Railway
     Quebec Central Railway
  Ontario Northland Railway
  Toronto, Hamilton & Buffalo Railway

MEXICAN LINES (in Mexico)

  Chihuahua Pacific Railway Company
  [Direccion General de Ferrocarriles en Operacion]:
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    Ferrocarriles Unidos del Sureste, S.A. de C.V.
  Ferrocarril del Pacifico, S.A. de C.V.
  National Railways of Mexico

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Aliquippa & Southern Railroad Company
American Refrigerator Transit Company
Ann Arbor Railroad System
Apalachicola Northern Railroad Company

Belfast & Moosehead Lake Railroad Company
British Columbia Hydro & Power Authority (CANADA)
British Columbia Railway (CANADA)
Brooklyn Eastern District Terminal Railroad

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Chicago Short Line Railway Company
Chicago South Shore & South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Chilean State Railways (CHILE, S.A.)
Cities Service Company Railroad
Cliffs Western Australian Mining Co. Pty. Ltd. (AUSTRALIA)
Colorado & Wyoming Railway Company
Cuyahoga Valley Railway Company

Dardanella & Russellville Railroad
Delray Connecting Railroad Company
Devco Railway (Cape Breton Dev. Corp. — Coal Div.) (CANADA)
Duluth & Northeastern Railroad Company

East Erie Commercial Railroad
East Jersey Railroad & Terminal Company
East St. Louis Junction Railroad Company
Empresa Minera Del Centrao Del Peru Railways (PERU, S.A.)
Essex Terminal Railway (CANADA)

Fepasa-Ferrovia Paulista (BRAZIL, S.A.)
Fruit Growers Express Company

Genesee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company

Hamersley Iron Pty. Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad
Hillsdale County Railway Company, Inc.

India, Gov't. of: Ministry of Railways (INDIA)

Japanese National Railways (JAPAN)

Korean National Railroad (KOREA)

LaSalle & Bureau County Railroad Company
Lenawee County Railroad Company, Inc.
Long Island Rail Road Company
Louisiana & North West Railroad Company

Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummelstown Railroad Company
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company

New Orleans Public Belt Railroad

Pacific Fruit Express Company
Pearl River Valley Railroad Company
Pickens Railroad — National Railway Utilization Corp.
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)

Quebec, North Shore & Labrador Railway Company (CANADA)

Rede Ferroviaria Federal S.A. (BRAZIL)
River Terminal Railway Company
Roberval & Saguenay Railway Company (CANADA)
Roscoe, Snyder & Pacific Railway Company

San Diego & Arizonia Eastern Transportation Company
Sierra Railroad Company (California)
South African Railways (REPUBLIC OF SOUTH AFRICA)
Southern Indiana Railway, Inc.
Spanish National Railways (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)
Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A Minas Railway (BRAZIL)

Wabash Valley Railroad Company
Wabush Lake Railway Ltd. (CANADA)
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In the

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-622

SOUTHERN PACIFIC TRANSPORTATION CO.,

Petitioner,

v.

COMMERCIAL METALS CO.,

Respondent.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE*

The Association of American Railroads as *amicus curiae* submits this brief in support of Southern Pacific Transportation Co., Petitioner. The Association of American Railroads urges this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit in *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 641 F.2d 235 (5th Cir. 1981).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 641 F.2d 235 (5th Cir. 1981). The opinion of the United States District Court for the Northern District of Texas, *Southern Pacific Transportation Co. Commercial Metals Co.*, No. CA3-77-0467-F (N.D. Tex. February 26, 1979), has not been reported.

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The questions raised by Southern Pacific on this appeal are a matter of compelling interest to the Nation's railroads and to the Association of American Railroads ("Association"). The Association is an unincorporated trade association whose membership includes almost all of the Class I railroads.[1] Its members operate 92 percent of the trackage, employ 94 percent of the workers, and generate 97 percent of the freight revenues of all railroads in the United States. The Association represents its members with respect to a variety of matters of concern to them, including matters that touch upon the granting of credit to rail customers and the collection of tariff charges, both of which directly affect the operations and income of railroads.

The relation between the railroads and shippers with respect both to discrimination and collection of tariff rates and charges is tightly controlled by the Federal government through the Interstate Commerce Act. A basic purpose of the Act is to prevent unjust discrimination between shippers by requiring tariff rates and charges to be uniformly applied. Uniformity in treatment was intended to benefit both carriers and shippers and has been enforced by this Court and confirmed by the Congress for almost a century. Should the decision of the Court below be allowed to stand, this underlying policy of the Interstate Commerce Act will be severely eroded.

The creation of a new defense to a claim for freight charges would have a significant adverse impact on railroad operations, to the detriment of the general shipping public. The complexities of today's rail system require that carriers extend credit to over 95 percent of their patrons. This practice is based not only on competitive necessity but also on the need to move cars 24-hours a day to optimize yard operations and increase car utilization. An estimated 22.6 million

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[1] As categorized by the Commission, Class I railroads are those roads having net annual revenues greater than $50 million. 49 C.F.R. § 1240.1(a)(1980). Of the 40 Class I freight railroads, only the Florida East Coast Railway and the Long Island Railroad are not members of the Association.

loaded freight cars were moved in 1980 by Class I railroads,[2] or approximately 62 thousand a day. With car movements of this magnitude, holding cars pending receipt of cash from the shipper is poor operating practice and is operationally impossible in a large number of cases. Delivery of shipments outside of normal business hours is often necessary to achieve optimum utilization of manpower and equipment. Thus, only in the rare instance where a shipper is known to have a poor credit rating or has shown a continuing inability to pay within the mandatory five day period, will a rail carrier demand cash in advance. Any restriction of credit or acceptance of checks would inevitably impair efficient rail operations.

Affirmance of the Fifth Circuit's decision would also lead to an explosion of cases in which shippers claim an equitable defense to their obligations to pay the full amount of the tariff rates and charges. The availability of such a defense would present the carrier with an unhappy choice. Either it sues the consignor for collection of freight charges, with every prospect of losing under the lower court's decision, or it faces civil or criminal action by the Interstate Commerce Commission for granting rebates to shippers in violation of section 6(7) of the Interstate Commerce Act, 49 U.S.C. § 10761(a) (Supp. III 1979), and the Elkins Act, 49 U.S.C. § 11903 (Supp. III 1979).

These considerations are of particular concern to an industry suffering from chronically low earnings — so low that in some cases survival itself is at stake. In 1980, the Interstate Commerce Commission found that only three Class I carriers were earning adequate revenues. *Railroad Revenue Adequacy — 1980 Determination, Ex Parte No. 416*, 365 I.C.C. 285 (1981).[3] The overriding concern of

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[2] ASSOCIATION OF AMERICAN RAILROADS, YEARBOOK OF RAILROAD FACTS, at 25 (1981).

[3] The three carriers found to have adequate revenues in 1980 were the Pittsburgh & Lake Erie Railroad Co. (which the Commission noted had written down its assets in 1979 without which its return on investment might not have met the adequacy level), the Clinchfield Railroad Co. (which was noted as being a lessor railroad with no shareholders' equity), and the Fort Worth & Denver Railway Co. (which, as the Commission observed, is a wholly owned subsidiary of the Burlington Northern Railroad Co.).

the Congress in the recently enacted Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Oct. 13, 1980) was the achievement of adequate revenues by the railroad industry. [4] To construe the Interstate Commerce Act in a manner that provides shippers with new grounds for avoiding payment for services rendered flies squarely in the face of the Congress' objectives.

SUMMARY OF ARGUMENT

The bill of lading constitutes the contract of carriage between the consignor and the carrier. When a consignor tenders a shipment to a carrier under a uniform straight bill of lading and elects not to execute the non-recourse clause contained therein, the consignor becomes liable for the lawful freight charges for that shipment. Under the bills of lading covering the shipments tendered by Commercial Metals, it elected not to sign the non-recourse provision and thereby authorized Southern Pacific to deliver the shipments to the consignee without prior payment of the freight charges. There was no breach of any duty owed to Commercial Metals under the contract of carriage, and Commercial Metals has no statutory or equitable defense to a claim for the freight charges. The question of whether section 3(2) of the Interstate Commerce Act or the credit regulations issued thereunder were violated is irrelevant to the question of liability under the bill of lading.

Permitting the use of a "credit violation" defense conflicts with section 6(7) which requires that all tariff rates and charges be collected by the carrier and paid by the person liable. The decision of the Fifth Circuit contravenes the purpose of section 6(7) to secure uniform treatment of shippers and to shut out any opportunity for rate discrimination.

The purpose of section 3(2) is primarily to protect carriers and also to assure that if credit is extended under Commission regulations it is done on a non-discriminatory basis. Section 3(2) is intended to avoid discrimination against competitors of the party to whom credit terms are extended; not to affect the obligations assumed by the consignor under the bill of lading.

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[4] *See, e.g.*, 49 U.S.C. §§ 10101a(3), 10701a (b)(3), (Supp. III 1979).

In light of the number of specific remedies available for enforcing section 3(2) the lower court's imposition of a new penalty — forfeiture of freight charges — is unnecessary and unwarranted. Where, as here, a comprehensive statutory and regulatory prescription of the relations between carriers and shippers has been in place for more than half a century, new, judicially imposed remedies should not be sanctioned.

ARGUMENT

I. Where A Consignor Does Not Execute The Non-Recourse Provision Of The Uniform Bill Of Lading, It Remains Liable For Tariff Rates And Charges.

The court below gave no weight to the contract between Commercial Metals and Southern Pacific. This contract, known as the uniform straight bill of lading,[5] sets forth the rights and obligations of both the consignor and carrier. As this Court has stated:

> The bill of lading . . . embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. *Each has in effect the force of a statute*, of which all affected must take notice.

Texas & Pacific Railway Co. v. *Leatherwood*, 250 U.S. 478, 481 (1919)(emphasis added). *See Illinois Steel Co.* v. *Baltimore & Ohio Railroad Co.*, 320 U.S. 508, 511 (1944).

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[5] A bill of lading serves three distinct functions. It is (1) a receipt for the goods, (2) a contract for carriage, and (3) documentary evidence of title to the goods. As a receipt, the bill recites the place and date of shipment; describes the goods, their quantity, weight, dimensions, identification marks, condition, etc. As a contract, the bill names the parties, specifies the transportation charge, and sets forth the parties' agreement with respect to the transportation and respective liabilities regarding loss and damage or payment of freight charges. *In the Matter of Bills of Lading*, 52 I.C.C. 671, 681 (1919). As evidence of title, its production is generally required before the carrier may release the goods. 49 U.S.C. § 88 (1976).

A straight bill of lading is one which is non-negotiable and states that the goods are consigned or destined to a specified person. 49 U.S.C. § 82 (1976).

In 1919, uniform bills of lading and the contents thereof were prescribed by the Interstate Commerce Commission and became as binding as any other Commission regulation. *In the Matter of Bills of Lading*, 52 I.C.C. 671, 721-22 (1919). The elements of this uniform bill of lading were carefully balanced by the Commission in the exercise of its administrative powers[6] and each has a purpose which requires its presence.

One of the provisions prescribed is the non-recourse provision. It appears on the face of the uniform bill of lading and allows the consignor to relieve itself of its primary obligation to pay lawful freight charges.[7] If the shipper does not execute the non-recourse

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[6] The components of a bill of lading clearly call for the exercise of administrative judgment as:

> the question of what rules and regulations are reasonable, or will be reasonable for the future, in connection with the transportation covered by the bill of lading, depends principally upon the adjustment of the carrier's compensation to the degree of risk which it incurs. . . . In other words, the question before us is not merely whether certain provisions would or would not be valid if incorporated in a contract between the parties, but rather: What should be the terms of the contract of carriage, the charges for which we are authorized and required to regulate?

Export Bill of Lading, 64 I.C.C. 347, 353-54 (1921).

[7] On the face of the uniform straight bill of lading appears the following language:

> If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement. The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges *(See Section 7 of conditions.)*
>
> (Signature of Consignor)

On the reverse side of the bill of lading appears section 7 of the conditions which recites as relevant:

> The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges . . .

In the Matter of Bills of Lading, 64 I.C.C. 357 (1921) (Appendix D).

clause, "then upon the failure of the consignee to pay for the freight charges, the shipper or consignor remains liable for the said freight charges." *Consolidated Freightways Corp. of Delaware* v. *Pacheco International Corp.* 488 F. Supp. 68, 70 (C.D. Cal. 1979).

The consignor is legally liable for all freight charges because it is the party that called upon the carrier to perform the transportation service. To give the carrier fair warning of any change in the liability of the consignor, the Commission found it reasonable to require an affirmative election by the consignor that was plainly visible to the carrier.

> In order to secure exemption from liability for the freight charges in case the shipment is delivered to the consignee without the collection of such charges, the consignor is required to append his signature to the following statement in a space on the face of the bill of lading provided for that purpose: "The carrier shall not make delivery of this shipment without payment of freight and other lawful charges."

In the Matter of Bills of Lading, 52 I.C.C. 671, 721 (1919). The failure of the Fifth Circuit to consider the terms of the bill of lading determinative of the legal liability of Commercial Metals for lawful tariff charges, renders the non-recourse clause meaningless.

In the Fifth Circuit's view of this case, the sole question before it was whether the failure of a carrier to comply with the Interstate Commerce Commission's credit regulations, 49 C.F.R. Part 1320 (1980), promulgated under section 3(2) of the Interstate Commerce Act,[8] was a defense available to a consignor even though the non-recourse clause in the bill of lading was not executed. It found the answer to that question in *Consolidated Freightways* v. *Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971). *Southern Pacific*, *supra*, at 237.

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[8] As pertinent 49 U.S.C. § 3(2) provides:

> No carrier by railroad . . . shall deliver or relinquish possession at destination of any freight . . . shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination.

Admiral, however, did not address the liability of a consignor under the uniform bill of lading. That case involved an action against a consignee. Relying on a misstatement by the carrier that freight charges were prepaid, the consignee in *Admiral* had paid freight charges to the consignor and, upon the carrier's demand, was faced with paying freight charges a second time. The consignee had no reasonable means to ascertain that the terms of the bill of lading were other than as stated therein. On these facts the Seventh Circuit found that the consignee was deprived of the ability to protect itself from possible double liability. *Admiral*, *supra*, at 59. That situation is distinguishable from the instant case where Commercial Metals did not opt to eliminate its responsibility for freight charges by executing the non-recourse provision in its contract with the carrier, did not rely to its detriment upon any representation by the carrier, and is under no threat of a duplicative payment.

By permitting a carrier's violation of section 3(2) to override the strict contractual obligations of the consignor, the Fifth Circuit has sanctioned a defense which can only lead to bizarre results. The question of whether or not section 3(2) has been violated in a particular case depends on very subjective standards. [9] Each time a carrier releases a collect shipment to a consignee without receiving payment, and the consignee fails to mail the payment within 5 days [10] arguably, there is a credit violation [11] sufficient to bar the carrier from collecting from the consignor. Thus, in the very circumstance in which the carrier would look to the consignor for payment, the existence of that circumstance would bar recovery.

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[9] *See* discussion, *infra*, pages 16-17.

[10] Payment is made when the check is mailed. 49 C.F.R. § 1320.13 (1980).

[11] At least one court has so held. *Brown Transportation Corp.* v. *Atcon, Inc.*, 144 Ga. App. 301, 241 S.E.2d 15 (1977), *cert. denied*, 439 U.S. 1014 (1978). *Compare United States* v. *Southern Railway Co.*, No. 78-0519, Slip Op. at 6-7(D.D.C. May 15, 1980), which held that the failure to collect within five days is not a per se violation of the credit regulations.

The question of whether section 3(2) has been violated is irrelevant to the question of liability under the bill of lading. First, as the Interstate Commerce Commission has recently stated:

> [Section 3(2)] contains no provision shielding a consignor from liability for lawful charges. Thus, a violation of section 3(2) by defendant, in itself, would have had no effect on complainant's responsibility for payment of undercharges.
>
> The question of complainant's liability does not turn on whether any provision of the act has been violated. Rather, it is governed by the bill of lading contract between the parties and must be decided by interpreting that contract.

C-G-F Grain Co., Inc. v. *Atchison, Topeka & Santa Fe Railway Co.*, 351 I.C.C. 710, 712 (1976).

Secondly, in invoking section 3(2) to absolve the consignor of liability, the court below has mistaken the shipper to be protected by that section. To the extent section 3(2) seeks to prevent undue discrimination, it is a shield not for the consignor but rather for the competitors of the person to whom credit is being extended. Were any equitable considerations to arise from a violation of section 3(2) by Southern Pacific they should not accrue to Commercial Metals.

Moreover, the consignor does not need protection through the enforcement of section 3(2). Under the bill of lading and the credit regulations both the consignor and the carrier must necessarily make a judgment as to the credit-worthiness of the consignee. The terms of sale of the goods which are the subject of the bill of lading reflect a judgment by the consignor as to the consignee's credit and, for that reason, prepayment by the consignee of the purchase price of the goods is often required. The bill of lading provides the means for prepayment of the freight by the consignee should the consignor deem that to be necessary. The consignor's decision not to execute the non-recourse clause of the bill of lading necessarily involves a judgment in the matter.

For the carrier's part, the credit regulations require that it not improvidently extend credit to the consignee. This is not to protect the consignor — because the consignor knows or should know the financial condition of its vendee — but, rather, to prevent preferential

treatment in the extension of credit and to protect the carrier's cash position. [12]

The Fifth Circuit misinterprets the relationship and respective obligations of the parties. The lower court took the view, that it would be unjust to hold Commercial Metals liable for payment "when its injury is solely the result of the improper and illegal business practices of Southern Pacific." *Southern Pacific, supra,* at 239. The court would remove completely from the consignor's shoulders any responsibility for ascertaining the nature of the firms with whom it deals. It would create the fiction that the consignor relies for its own protection completely on the carrier's determination of the consignee's credit-worthiness rather than on the non-recourse clause which is available for the consignor's protection. There is simply no basis in law or fact for creating this duty-reliance status between the carrier and the consignor. One could as well argue that the carrier relied to its detriment upon the consignor's failure to execute the non-recourse clause as satisfactory evidence of the consignee's credit-worthiness.

Commercial Metals has not suffered any injury at the hands of Southern Pacific which calls for equitable relief. It had its goods delivered to its customer and has admitted that it received payment for those goods from Carco. [13] After Southern Pacific released the car to Carco it could have asked Commercial Metals for payment. Commercial Metals would have been compelled to pay, putting it in exactly the same position it now seeks to avoid. Under the bill of lading, Commercial Metals authorized Southern Pacific to deliver the shipment to Carco without prior payment. There was no breach of any duty owed to Commercial Metals under the contract of carriage, and Commercial Metals has no complaint in law or equity.

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[12] *See* discussion, *infra,* pp. 18-20.

[13] Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, at 13.

II. The Credit Violation Defense Created By The Court Below Contravenes The Anti-Discrimination Policies Of The Interstate Commerce Act.

A. *Section 6(7) Requires That All Tariff Rates And Charges Be Collected By The Carrier And Paid By The Person Legally Liable.*

The amount of freight charges is legally fixed by a tariff which a common carrier must file with the Commission. The carrier has a legal duty to collect the full amount of all tariff rates and charges and the person liable has an equal duty to pay. A carrier's failure to collect or receive the proper amount constitutes a violation of section 6(7).[14] *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Fink*, 250 U.S. 577, 582 (1919).

The requirement that carriers collect and shippers pay lawful tariff rates and charges is the core of the Interstate Commerce Act. Its purpose is ". . . to secure uniformity, reasonableness, and certainty of charges for services. A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law." *Louisville & Nashville Railroad Co.* v. *Dickerson*, 191 F. 705, 709 (6th Cir. 1911). "The salutary purpose of the statute is to secure uniform treatment of shippers and to shut out opportunity for discrimination and favoritism." *Atchison, Topeka and Santa Fe Railway Co.* v. *Bouziden* 307 F.2d 230 (10th Cir. 1962). Or as the Interstate Commerce Commission stated:

> It would be difficult, if not impossible, to prevent the unjust discrimination and undue prejudice forbidden by the interstate commerce act (sic) if carriers subject to that act could vary the

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[14] Section 6(7) as pertinent provides:

(N)o carrier (shall) charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

> terms of the contract of transportation at will in dealing with different shippers of the same commodity.

Export Bill of Lading, 64 I.C.C. 347, 352 (1921).

As this Court held in *Keogh* v. *Chicago & North Western Railway Co.* 260 U.S. 156 (1922), the terms of the tariff may not be altered as "otherwise the paramount purpose of Congress — prevention of unjust discrimination — might be defeated." *Id.* at 163. *Keogh* involved an antitrust action brought by a shipper claiming that a rate was higher than that which would otherwise have prevailed because of the carriers' illegal collusion in setting the rate. This Court denied the shipper relief because even if the carrier had violated the antitrust laws, the extra amount recovered might, like a rebate, operate to give it a preference over its trade competitors. *Id.* Applying this rationale to the instant case, even if the extension of credit to the consignee were determined to violate section 3(2), relieving the consignor of responsibility for the charges would give the consignor a rebate in violation of section 6(7).

As a result of the proscription of section 6(7), this Court has stated repeatedly that no "act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefore." *Louisville & Nashville Railroad* v. *Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *See Texas & Pacific Railway Co.* v. *Leatherwood*, 250 U.S. 478, 481 (1919). Similarly, this Court noted in *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478 (1939) that "equitable considerations may not serve to justify failure of [a] carrier to collect, or retention by [a] shipper of, any part of lawful tariff charges." *Id.* at 485. The policy underlying the application of this rule is so strong that courts have denied estoppel despite a variety of pleas of hardship. [15]

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[15] *See Chicago, Burlington & Quincy Railroad Co.* v. *Ready Mixed Concrete Co.*, 487 F.2d 1263, 1266 (8th Cir. 1973); *Bartlett — Collins Co.* v. *Surinam Navigation Co.*, 381 F.2d 546 (10th Cir. 1967) (Consignor denied defense where it had already paid freight forwarder to which carrier had extended credit improvidently); *Atchison, Topeka & Santa Fe Railway Co.* v. *Bouziden*, 307 F.2d 230, 234 (10th Cir. 1962). (Diversion order which was not followed by carrier because it was verbal contrary to terms of

As the Commission has stated, the evil of one shipper receiving a lower rate, whether by mistake or not, was addressed in the amendments to the Act defining any departure from the published tariff as a criminal offense:

> Under the force of these enactments the published rate has taken on a fixed and rigid character that does not permit it to yield either to importunity or to mistake.. . . In this respect the published rate has become a protection to shippers and carriers alike.. . . [W]hen once lawfully published, a rate . . . is as fixed and unalterable either by the shipper or the carrier as if that particular rate had been established by a special act of the Congress. When regularly published it is no longer the rate imposed by the carrier, but the rate imposed by the law. The law governing transportation between the two points for which that rate was established requires that rate to be paid by the shipper and collected by the carrier, and any departure from it, either by the carrier or the shipper, is as much a crime as it would be if the rate had been fixed by specific enactment. Not even a court may interfere.. . .

A.J. Poor Grain Co. v. *Chicago, Burlington & Quincy Railway Co.*, 12 I.C.C. 418, 422-23 (1907).

Admittedly, rigid application of a statutory standard to secure absolutely equal treatment of the entire shipping public can lead to harsh results in individual cases. Nevertheless relief has been denied.

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tariff, did not release shipper from duty to pay higher combination rate and compromise agreement between the carrier and shipper could not defeat section 6(7)'s mandate); *National Carloading Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 150 F.2d 210, 212 (9th Cir. 1945) (Provision of cotton compacting service by carrier deemed by Commission to be a benefit to shipper for which compensation required); *Davis* v. *Timmonsville Oil Co.*, 285 F. 470 (4th Cir. 1922) (Consignee not excused by carrier's delay in presenting demurrage bill which precluded consignee from taking action to protect itself); *Pennsylvania Railroad Co.* v. *Greene*, 173 F.Supp. 657, 659 (S.D. Ala. 1959) (Consignor/consignee who had signed section 7 but gave reconsignment order orally in contravention of requirement in bill of lading that it be in writing, held liable for extra freight charges.); *Fort Worth & Denver City Railway Co.* v. *F. Burkart Manufacturing Co.*, 56 F.Supp. 159 (E.D. Mo. 1944) *aff'd* 149 F.2d 909 (8th Cir. 1945) (Carrier conspiracy with consignor to charge unlawfully low rates, did not estop carrier from recovering rate fixed by law from consignee).

> Occasional hardships may result from any inelastic rule of general application. The principle, however, is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points, and that it shall be unalterable by any act or omission by the carrier or the particular shipper.

Id. at 422-23. *See Chicago, Rock Island & Pacific Railway Co.* v. *Central Warehouse Co.*, 14 F.2d 123, 124-25 (D. Minn. 1926) *aff'd* 20 F.2d 828 (8th Cir. 1927).

There is one line of cases in which some lower courts have permitted an equitable defense to lie in the face of the section 6(7) mandate and these cases are narrowly restricted to a specific fact situation in which the consignee had relied on a bill of lading marked prepaid by the carrier, had already paid the consignor, and was faced with a demand from the carrier for a duplicate payment.[16] These courts, notwithstanding the applicable legal rules set forth above, held that the carrier was estopped from collecting the tariff charges from the consignee and that the section 6(7) duty to pay was discharged by the consignee, even though payment was made to the consignor rather than the carrier. In that situation, these courts found that the consignee received no preferential treatment over its competitors. While cited by the Fifth Circuit as support for its decision, none of these courts endorsed the principle espoused by the Fifth Circuit that a consignor who does not execute the non-recourse provision should be excused because the consignee was given credit and failed to pay. They are clearly distinguishable from the instant case where neither Commercial Metals, nor the consignee, have paid the freight charges. Here, there is no threat of a double payment and the obligation under section 6(7) that the person legally liable pay has not been satisfied.

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[16] *See Consolidated Freightways Corp.* v. *Admiral Corp.* 442 F.2d 56 (7th Cir. 1971). *Contra, Southern Pacific Co.* v. *Wheaton Brass Works*, 5 N.J. 594, 76 A.2d 890 (1950), *cert. denied*, 341 U.S. 904 (1951).

B. *The Decision Of The Lower Court Will Create An Environment In Which Discrimination Will Be Facilitated.*

The "credit violation" defense will also undermine the broader anti-discrimination policy of the Interstate Commerce Act by giving carriers and shippers an effective tool for "collusionary discrimination." *See Empire Petroleum Co.* v. *Sinclair Pipeline Inc.*, 282 F.2d 913, 916 (10th Cir. 1960). The Fifth Circuit described its anti-discrimination test as follows:

> In each case the court must consider whether, under the circumstances presented, allowing the defense would undermine the purpose of the Interstate Commerce Act. The proper inquiry, then, is whether our recognition of the defense offered by Commercial in this case "will serve directly or indirectly as a cover for freight rate discrimination."

Southern Pacific, supra, at 238. The Fifth Circuit found that the facts of the instant case did not reveal a situation in which denial of recovery to the carrier would serve as a cover for rate discrimination in favor of Commercial Metals. Even if this test were valid, the Fifth Circuit misapplied it.

The Fifth Circuit improperly narrowed its focus to the question of whether Commercial Metals asserted the equitable defense to cover a discriminatory concession or arrangement to benefit it. The question is not whether the defense serves as a cover for a particular case, but whether the judicial determination in permitting use of the defense under a given set of facts opens the door to future discriminatory practices. In the instant case it does. For example, based on the decision of the Fifth Circuit a carrier could agree not to collect freight charges from a consignor in exchange for future traffic considerations.

Violations of credit and other statutory or regulatory requirements are easily contrived. For this reason, section 6(7) forbids using actions of the carrier whether voluntary or not, as a defense. *See A.J. Poor Grain Co.* v. *Chicago, Burlington & Quincy Railway Co.*, 12 I.C.C. 418 (1907); *Norfolk & Western Railway Co.* v. *Williamson Grocery Co.*, 138 S.E. 102, 104 (W. VA. 1927).

C. *The Decision Of The Lower Court Will Creat Uncertainty In The Law.*

Whether a violation of section 3(2) or the credit regulations is found to have occurred turns upon an analysis of facts that may be heavily weighted by subjective considerations. The decision of the court below points up the perils of attempting to apply a credit violation defense. Which aspects of the three separate and distinct transactions prompted the lower court to find a violation of section 3(2) is not clear. Southern Pacific was required to release the last two cars upon receiving the bills of lading and the checks for the payment of their transportation charges. 49 U.S.C. § 88 (1976).[17] The fact that Carco had not paid the freight for the first car is irrelevant. The carrier may not offset charges owed by a shipper for one shipment against charges due on completely different shipments. The carrier's lien extends only to the goods described in that bill of lading, not previously shipped cargo. *Atlas S.S. Co.* v. *Colombian Land Co.*, 102 F. 358, 361 (2nd Cir. 1900).[18] The receipt of checks for the last two cars also complies with the credit regulations. Payment by check is uniformly considered as valid in the industry. *Fullerton Lumber Co.* v. *Chicago, Milwaukee St. Paul & Pacific Railroad*, 282 U.S. 520, 522 (1931).[19] No reason was given why Southern Pacific should be prohibited from collecting freight charges on these two cars.

A credit violation defense is especially disturbing as the carrier has no way to force a shipper to pay in five days. It can cut off credit on the sixth day, which Southern Pacific did, or sue, which Southern Pacific

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[17] Section 88 provides in part:

> A carrier . . . is bound to deliver goods upon a demand . . . accompanied by —
>
> (a) an offer in good faith to satisfy the carrier's lawful lien upon the goods; (and)
>
> (b) Possession of the bill of lading . . .

[18] *See* UCC Sec 7-307 which states:

> A carrier has a lien on the goods covered by a bill of lading for charges *subsequent* to the date of its receipt of the good . . . (emphasis added). *See British West Indies Produce, Inc.* v. *Ohio Eastern Express, Inc.*, 11 U.C.C.R.S. 1234 (NY Civ. Ct. 1973).

[19] See also 49 C.F.R. § 1320.13 (1980).

also did. Cutting off credit to shippers if one bill is not paid within five days would mean most shippers would have their credit terminated at some time. The Commission specifically rejected incorporating this rigid approach in *Regulations for Payment of Rates and Charges, Ex Parte No. 73*, 326 I.C.C. 483 (1966), in spite of the recommendations of the Commission's Bureau of Enforcement that rules be formulated prohibiting a carrier from extending credit to a late paying shipper or one with past due bills. *Id.* at 485, 489. As the Commission has stated, violations of its regulations were not uncommon, and were in many instances involuntary. *Id.* 489. In the 1966 proceeding, out of 445,984 collectible items accrued during the Bureau of Enforcement's investigation, 10,202 (or about 2.24 percent) resulted in credit violations. *Id.* at 486.

Given the large number of transactions involved in operating the rail system, it is inevitable that regulations dictating credit terms will not always be strictly observed if for no other reason than the predictability of human error. Many violations will be caused by shippers, not carriers. *Id.* at 487. Whether a violation constitutes an equitable defense will always be a judgment call and shippers will surely exploit the uncertainty in the law.

It is of paramount importance to the rail industry and the shipping public that a clear rule be established to govern collection of freight charges. For that reason, this court should reaffirm its position in *Louisville & Nashville Railroad Co.* v. *Central Iron & Coal Co.*, 265 U.S. 59 (1924) that no act or omission of the carrier may estop it from enforcing payment of the full amount by a person liable therefor. *Id.* at 65. Such a rule ensures that carriers and shippers alike comply with section 6(7) and, uniformity achieved, potential discrimination under that section will be thwarted. A loose equity test such as that prescribed, but not defined, by the court below can only result in different outcomes as the perception of equity changes from jurisdiction to jurisdiction.

III. Section 3(2) Of The Interstate Commerce Act Was Not Intended To Relieve A Consignor Of Legal Obligation To Pay Lawful Tariff Rates And Charges.

A. *The Principal Purpose Of Section 3(2) Is To Protect Carriers.*

The decision below reflects a belief that the sole purpose of section 3(2) was to ensure that all shippers receive the same credit treatment and that any deviation by a carrier is unlawful and inequitable. To the contrary, unjust discrimination in all forms had already been proscribed under sections 2 and 3(1) of the Interstate Commerce Act and made subject to the criminal sanctions of the Elkins Act. 49 U.S.C. § 41(1) [subsequently recodified at 49 U.S.C. § 11903 (Supp. III 1979)]. *See United States* v. *Hocking Valley Railway Co.*, 194 F. 234, 246 (N.D. Ohio 1911). The primary consideration behind the later enactment of section 3(2) was the need to protect the carriers' cash flow by preventing shippers from obtaining long periods of credit by threatening to shift their business to a more cooperative carrier.

The granting of long credit periods simply to keep traffic had placed many carriers in a precarious financial position by 1918. Estimates by the rail carriers placed the amount of lost cash at $75 million. *See In re Section 3 of the Interstate Commerce Act, Ex Parte No. 73*, 57 I.C.C. 591, 594 (1920). The large amount of outstanding due bills was impairing the carriers' ability to generate sufficient funds to carry out their common carrier obligations. To rectify this strain on the national transportation system, the Director General of Railroads,[20] issued General Order No. 25 which cancelled all existing credit arrangements, placing all transportation services on a cash basis.

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[20] By virtue of the war powers granted to the President during World War I, the control and operations of the railroads were taken over by the President on December 28, 1917, and exercised by William G. McAdoo, Director General of Railroads. GOVERNMENT CONTROL OF RAILROADS, PROCLAMATION BY THE PRESIDENT S. Doc. No. 159, 65th Cong., 2d Sess. (1917).

The effects of General Order No. 25 were so salutary that when the operation and control of the railroads were returned to carrier management by the United States Government at the termination of World War I, Congress incorporated its provisions in section 405 of the Transportation Act of 1920 which added section 3(2) to the Interstate Commerce Act. That Congress intended to continue the credit practices instituted by the Director General of Railroads in General Order No. 25, is clearly indicated in the report of the House of Representatives on the bill which became the Transportation Act of 1920.

> Section 405 provides that, after July 1, 1920, no railroad shall relinquish possession of freight at destination until all rates and charges thereon have been paid except under such rules as the Commission may prescribe to assure prompt payment and prevent unjust discrimination. *The latter provision virtually continues the operation of General Order No. 25 of the Railroad Administration, as supplemented, relating to the extension of credits by railroads*. H.R. REP. No. 650, Vol. 1, 66th Cong. 2nd Sess. 63 (1920). (To accompany H. RES. No. 10453)(emphasis added).

The Commission itself noted that Congress' intent in enacting this section was to continue the provisions of General Order No. 25. *In re Section 3 of the Interstate Commerce Act, Ex Parte No. 73*, 57 I.C.C. 691, 696 (1920); *See Chicago Junction Railway* v. *Duluth Log Co.*, 202 N.W. 24 (Minn. 1925). In this proceeding, the Commission limited credit extensions to those instances where prompt release or delivery of the car would be retarded, and then only for a maximum of 96 hours. These criteria were established for the benefit of the carriers and general shipping public. The cost of money is a cost of transportation and to the extent a shipper is allowed to unduly delay the payment of a freight charge, it has increased that cost to the detriment of all other shippers.

This "cost" is significant given the sheer volume of rail transactions. In 1980, railroad freight revenues were $26.3 billion,[21] or

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[21] ASSOCIATION OF AMERICAN RAILROADS, "OPERATING & TRAFFIC STATISTICS, FREIGHT REVENUE SECTION 101" (August 1981).

$72.2 million per day. Taking the conservative estimate that 95 percent of rail shipments move on credit, approximately $68.6 million is received daily from credit customers. Ignoring the time required for sending the bill and returning the payment, the existing five day credit period provides a $343 million loan to shippers. Because of the magnitude of the costs of credit, the Commission has often acted to protect the working capital of the carriers by rejecting the arguments of commercial interests seeking longer credit periods. *See In re Section 3 of the Interstate Commerce Act as Amended*, 171 I.C.C. 268, 277, 280-81 (1931); *Ex Parte No. 73, Regulations for Payment of Rates and Charges*, 310 I.C.C. 391 (1960), *aff'd* 313 I.C.C. 97 (1960).

The history of section 3(2) and the credit regulations make it clear that Congress and the Commission did not intend a violation of the rules by a carrier in extending credit to a consignee to be used as a tool by a consignor to evade its duty to pay lawful tariff rates and charges. This is especially clear where, as here, there has been no showing that the consignor has been harmed competitively or that undue discrimination has occurred.

B. *Enforcement Of The Credit Regulations Does Not Require Action So Draconian As Absolving The Consignor Of Liability For Freight Charges.*

If the court below was attempting to provide a disciplinary tool to encourage carrier compliance with credit regulations, it should have examined existing remedies before concluding that an instrument as blunt as the one it forged was required. Extensive remedies are already available under the Interstate Commerce Act to protect the public from violations of the laws and regulations governing the transportation of goods by carriers.

If a carrier provides discriminatory credit terms to a person's competitor, that party may file a complaint with the Commission seeking a cease and desist order and damages. *Shaw Warehouse Co. v. Southern Railway Co.*, 308 I.C.C. 609, 633-34, 637 (1959). The Commission may also institute on its own motion a similar action to enjoin unjust discrimination or enforce its orders. 49 U.S.C.

§ 11702(a) (Supp. III 1979). *See Interstate Commerce Commission* v. *All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974).

Under 49 U.S.C. § 11901 [previously 49 U.S.C. § 16(8)], the United States Government is authorized to seek civil penalties of $5,000 for each knowing violation of an order of the Commission. Thus, in *United States* v. *Pennsylvania Railroad Co.*, 308 F. Supp. 293 (E.D. Pa. 1969) a carrier which extended credit more than five days on numerous occasions to two customers with unpaid freight bills, was held to have knowingly failed to obey an order of the Commission. *See also United States* v. *Western Pacific Railroad Co.*, 385 F.2d 161 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). The experience of the railroad industry is that the Commission continues to enforce actively the credit regulations through civil forfeiture suits where warranted by carrier conduct.

In addition, criminal sanctions of a fine of at least $1,000 but not more than $20,000 or imprisonment for not more than two years, or both, may be sought against a person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service (1) at less than the rate in effect under Chapter 107 of this title, or (2) by practicing discrimination. 49 U.S.C. § 11903 (a)[previously 49 U.S.C. § 41(1)]. Under that section, a carrier's course of conduct could amount to undue discrimination. *Continental Shippers Association* v. *United States*, 328 F.2d 966 (9th Cir. 1964). In that case, while the court found no discrimination on the part of the carrier — indeed the factual evidence indicated the carrier had continually objected to late payments and finally suspended credit — the court did state that "if the evidence had shown a long-standing record of unobjected to late payments, a course of action amounting to the giving and receiving of discriminatory credit might be found." *Id.* at 969.

In essence, the decision below has fashioned a new remedy for the violation of section 3(2) of the Act and the regulations promulgated thereunder. Specific, and more appropriate remedies have been provided by Congress. The creation of the additional remedy in view of the comprehensive statutory scheme already in place, should be rejected. Such a defense is not necessary to effectuate the purpose of the Interstate Commerce Act.

CONCLUSION

The lower court erred in permitting Commercial Metals to assert a defense based on a violation of section 3(2) of the Interstate Commerce Act and the regulations thereunder, when Commercial Metals was primarily liable for all tariff rates and charges under the terms and conditions of the bill of lading, and the judgment below should be reversed.

Respectfully submitted,

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No. 81-662

IN THE

Supreme Court of the United States

October Term, 1981

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,

vs.

COMMERCIAL METALS CO., *et al.*,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AMICUS CURIAE

The National Industrial Traffic League as *amicus curiae* submits this Brief in support of Commercial Metals Company, respondent. The League urges this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 641 F.2d 235 (5th Circuit 1981). Consents to the filing of this Brief have been received from counsel for both the petitioner and the respondent, and have been filed with the Clerk of the Court.

STATEMENT OF THE INTERESTS OF THE AMICUS CURIAE

The National Industrial Traffic League is an unincorporated association whose membership includes 1,800 members. These members are shippers and receivers of freight and users of transportation services located throughout the United States. These shippers and receivers are extensively engaged in using the transportation services provided by rail carriers and motor carriers regulated by the Interstate Commerce Commission under the provi- by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

Both types of carriers, when engaged in transportation in interstate commerce, use the provisions of the uniform bill of lading first prescribed by the Interstate Commerce Commission for railroads in 1919. The League was involved in the development of these uniform provisions. In addition, such carriers are subject to regulations governing the payment of freight charges and the extension of credit prescribed by the Commission under the provisions of 49 U.S.C. § 10743.

The issues in this case involve the rights and liabilities of a shipper and a carrier in a situation where the carrier has observed neither the provisions of the bill of lading contract nor the applicable Commission credit regulations. The Court below held that in such a situation, the shipper had an affirmative defense against the collection of the freight charges when based on the carrier's noncompliance with either the bill of lading contract or the credit regulations. The issue in this case is of importance to the League's members, because it involves the ability of shippers to rely on such compliance with the bill of lading contract and the applicable regulations in order to

facilitate the free flow of commerce. Shippers utilizing the services of carriers should be able to rely on their compliance with the bill of lading contract terms and conditions and the governing regulations and should not be exposed to secondary liability for freight charges long after the transportation services have been provided.

SUMMARY OF THE ARGUMENT

Previous decisions of this Court have established that liability for a carrier's freight charges, as between a consignor or a consignee, is not covered by the Interstate Commerce Act, but is a matter of common law. In an action by a carrier for collection of unpaid freight charges against a consignor, the latter is permitted to raise as a defense under contract law the carrier's non-compliance with the terms of the bill of lading contract. He is also permitted to raise as a defense under principles of equity the carrier's non-compliance with regulations governing the extension of credit to consignees for payment of freight charges.

ARGUMENT

Since 1919, the Interstate Commerce Commission has prescribed for observance by rail carriers subject to its jurisdiction the form and substance of the bill of lading contract between shippers and railroads. See 49 U.S.C. § 10702(a)(2)(A) and *Illinois Steel Co. v. Baltimore & Ohio R. Co.*, 320 U.S. 508, 509, 510 (1944). With respect to motor common carriers in interstate commerce, while the Commission has authority to prescribe a uniform bill of lading contract (see *Southeast Shippers Association v. Associated Transport, Inc.*, 61 M.C.C. 645, 652-653 (1953)), it has not exercised that authority. Nonetheless,

the standard provisions of the prescribed rail bill of lading contract are widely used in the motor carrier industry.

As applicable to this case, which involves rail transportation, the particular provisions of the bill of lading contract involved are found in Section 7. The provisions of Section 7, as prescribed by the Interstate Commerce Commission in the matter of *Bills of Lading*, 66 I.C.C. 63 (1922) and 245 I.C.C. 527 (1941), may be found in appendix A to this brief and may also be found at pages 37 and 41 of the Joint Appendix.[1]

The key provisions of Section 7 are the first two sentences, as first prescribed in 1919 and modified in 1922. They are as follows:

> The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may be lawfully authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for all the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the place provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier,

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[1]It should be noted by the Court that the provisions of Section 7 of the bill of lading cited at page 6 of the Brief of the Association of American Railroads as amicus curiae are in error. The provisions cited there are from the uniform *export* bill of lading, prescribed by the Commission at the same time that it prescribed the domestic bill of lading. Compare *Export Bill of Lading*, 64 I.C.C. 347 (1921) with *Domestic Bill of Lading*, 64 I.C.C. 357 (1921).

> contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges.

These contractual provisions place an equal obligation to pay the freight charges on either the consignor or the consignee, although the consignor may avoid liability absolutely by executing the non-recourse provision. See *Illinois Steel Co. v. Baltimore & O.R. Co., supra*, 320 U.S. at 513.

But even where the non-recourse provision has not been executed, but the consignee has accepted delivery, he is exclusively liable for the freight charges, under the rule of *Pittsburgh C.C. & St.L. Ry . Co. v. Fink*, 250 U.S. 577 (1919). In that case, it was held that, notwithstanding the requirement of the Interstate Commerce Act that the full applicable legal tariff rate be collected, when the consignee accepted delivery of the shipment from the carrier, the consignee is liable as a matter of law for the freight charges. See 250 U.S. at 580-583. See also *Louisville & N.R. Co. v. United States*, 267 U.S. 395, 397 (1925); *Louisville & N.R. Co. v. Central Iron Co.*, 265 U.S. 59, 70 (1924); and *New York Central & H.R. R. Co. v. York & Whitney Co.*, 256 U.S. 406, 408 (1921).

It should be noted by the Court that in 1922 the I.C.C. modified the provisions of Section 7 (in particular in the first sentence) at the request of both carriers and shippers, to "eliminate doubt as to the liability of the consignee for charges accruing on shipments consigned to him." See 66 I.C.C. at 64, where the Commission also noted that one of the reasons for the change was that: "It is well-settled law that a *consignee* accepting delivery of a shipment becomes liable for the charges lawfully accruing thereon." [emphasis added] It is obvious that the Commission had in

mind the then well-settled principles of the *Fink* case, *supra*, and similar cases.

The Commission also noted that there was no conflict between the proposed modification and the provisions of Section 3 of the Interstate Commerce Act. Those provisions included Section 3(2), now codified at 49 U.S.C. § 10743. (See Appendix B.) That statute prohibits a carrier from relinquishing possession of property being transported unless there has been either payment of the freight charges or compliance with regulations adopted by the Commission to prevent discrimination and insure payment. Those regulations are found at 49 C.F.R. Part 1320 [rail carriers] and 49 C.F.R. Part 1322 [motor carriers] (1980). The statute and the regulations plainly put an obligation on a carrier to either receive payment or assure itself of such payment before making delivery of a shipment at destination.

The question presented in this case is what rights and liabilities arise when a carrier complies with neither the provisions of the bill of lading contract nor the provisions of the statute and regulations governing the extension of credit. The Court below properly held that in such circumstances the carrier may not collect the unpaid freight charges from the shipper, even where the shipper has not executed the non-recourse provisions of the bill of lading contract.

It has long been recognized that the determination of liability under the bill of lading contract as between the consignor and the consignee for the payment of the applicable freight charges is a matter exclusively for the courts. See *C-G-F Grain Co., Inc. v. Atchison, T. & S.F. Ry. Co.*, 351 I.C.C. 710, 712 (1976), and cases cited

therein.[2] And in resolving the question of liability for the payment of freight charges as between a consignor or a consignee on the one hand and the carrier on the other, this Court has uniformly held that, when the tariffs do not prescribe who is to pay the freight charges, the parties are free to stipulate among themselves who shall pay the freight charges, subject to the prohibition against unlawful discrimination and the limitations imposed by the uniform prescribed bill of lading. See *Illinois Steel Co. v. Baltimore & O.R. Co., supra,* 320 U.S. at 511-512 and *L&N R. Co. v. Central Iron Co., supra,* 265 U.S. 59 at 65-67. In the latter case, in an opinion by Justice Brandeis, the Court noted first that the bill of lading contract could not reduce the amount of freight charges legally payable by reason of the tariff. The opinion then went on to note, however, that:

> [D]elivery of goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation to pay the freight charges. The tariff did not provide when or by whom the payment should be made. As to these matters, carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. 265 U.S. at 65-66. [footnotes omitted]

These decisions by this Court make it plain that there is no provision in the Interstate Commerce Act which settles the question of responsibility as between consignor or consignee with respect to the liability for payment of freight

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[2]It should be noted that some of the parties to this case have cite this I.C.C. decision for the proposition that a violation of Section 3(2) would not affect the liability of shipper for the payment of freight charges. However, since the I.C.C. plainly noted its lack of jurisdiction to decide the question, this observation is plainly *obiter dictum.*

charges.[3] Since, as Justice Brandeis stated in the *Central Iron* case, neither the consignor nor the consignee are absolutely liable under the Act, it follows that they would have available to them any and all defenses arising under applicable legal and equitable principles against any action by a carrier to collect unpaid freight charges. The provisions of the bill of lading contract, Section 7, make it plain that, in a case where the non-recourse provision is not executed, the consignor and consignee are equally liable for the payment of the freight charges, subject to whatever defenses are appropriate. Section 7 includes a requirement, as part of the contract of transportation between the carrier and the shipper, that:

> No carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid.

The validity and enforceability of this provision does not depend on the execution of the non-recourse provision when the shipment is tendered to the carrier at origin by the shipper.

Moreover, when, as in this case, the carrier delivered the shipments to the consignee without complying with the prescribed credit regulations, the carrier should not be permitted to recover the charges from a consignor who is without fault, and has no knowledge of the discrimination. The carrier failed to carry out its obligations under the I.C.C.'s credit regulations. It is plain from the stipulated record that if the carrier had carried out its obligations under the Act and the regulations, there would have been no need for it to seek recovery of the freight

[3] 49 U.S.C. § 10744 deals with the liability for freight charges of a consignee who is an agent for another, a circumstance not involved in this case.

charges from the consignor. In short, the carrier seeking recovery does not have clean hands, and a court may permit the assertion of any appropriate equitable defenses. This Court has recognized that, in appropriate factual circumstances, published tariff rates are not immune from the application of equitable principles. *Inland Steel Co.* v. *United States*, 306 U.S. 153, 159 (1939).

The equities of the case at bar are clearly in favor of the innocent consignor, just as they were in the following case:

> In this case a carrier seeks to extend the protective policy of the statute in order to be held harmless from credit losses resulting directly from its own flagrant disregard of regulations promulgated under the statute. To accomplish this noble end it would require an innocent consignee to defray freight costs exactly double the amount contemplated by the applicable tariffs. As Judge Cummings' opinion demonstrates, the cases on which appellant relies do not remotely justify any such perverse result.

Consolidated Freightways Corp. v. Admiral Corp., 442 F.2d 56, 65 (7th Cir. 1971) (Stevens, J., concurring opinion).

The prior decisions of this Court plainly hold that the question of liability, as between a consignor and a consignee, for a carrier's freight charges is a matter of common law, and not a matter covered by the Interstate Commerce Act. In such a case, the determination of the defenses available to the party from whom recovery is sought is a matter of applying the appropriate principles of law and equity to the facts of the case.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Dated at Washington, D.C. this 4th day of February, 1982.

Respectfully submitted,

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Appendix

APPENDIX A

Sec. 7. *The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but,* except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for all the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the place provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. *Provided, that,* where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and the absence of such beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so recognized or diverted, the beneficial owner,

shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. [On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.]

[If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner,

such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery]

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in the bill of lading, the freight charges must be paid upon the articles actually shipped.

[Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.]

Italicized portions prescribed by I.C.C. in 1922; see 66 I.C.C. 63.

Bracketed portions prescribed by I.C.C. in 1941; see 245 I.C.C. 527.

APPENDIX B

§ 10743. Payment of rates

(a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by it only when payment for the transportation or service is made.

(b)(1) Under regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment of the transportation or service. The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers.

(2) Such a carrier (including a motor common carrier being used by a freight forwarder) may extend credit for transporting property for the United States Government, a State, a territory or possession of the United States, or a political subdivision of any of them.